

06-70884

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES,

Petitioner-Appellant,

v.

**STEVEN ORNOSKI, Acting Warden of
California State Prison at San Quentin,**

Respondent-Appellee.

DEATH PENALTY CASE

SUPPLEMENTAL EXCERPTS OF RECORD

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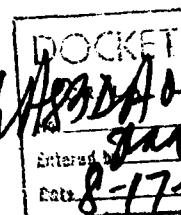
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SUPREME COURT OF THE STATE OF CALIFORNIA



THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff-Respondent-Appellant,)
)
 vs.)
)
 MICHAEL ANGELO MORALES,)
)
 Defendant-Appellant-Respondent.)

Superior Court
 No. CR 17960

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE CHARLES R. McGRATH, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

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MICHAEL ANGELO MORALES
 In Propria Persona

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1 A. Mike.

2 Q. And after the call was over, did he tell you
3 anything about the call?

4 A. He said it was Rick.

5 MR. HOLMES: Object --

6 BY MR. GARBER:

7 Q. Rick who?

8 A. Ortega.

9 Q. And did he say anything about it?

10 A. He told me Rick was gonna come over later.

11 MR. HOLMES: Object to any statements of whoever might
12 have been on the other end of the phone.

13 MR. GARBER: I think this is --

14 THE COURT: No. The objection is overruled.

15 BY MR. GARBER:

16 Q. Did he say what Rick was going to do?

17 MR. HOLMES: Asked and answered.

18 THE COURT: Overruled.

19 You may answer.

20 BY MR. GARBER:

21 Q. Did he say what Rick was going to do?

22 A. He was going to come over.

23 Q. Did he say anything else?

24 A. He was gonna pick up a girl.

25 Q. Did Mike tell you something about what Mike was
26 going to do?

27 A. He -- he told me that he was gonna do Rick a favor.

28 Q. Did he say what the favor was going to be?

1 A. He said that, um, he was gonna hurt this girl.

2 Q. Did he say what he was going to do to the girl?

3 A. Yes.

4 Q. What did he say he was going to do?

5 A. He said he was going -- he was gonna strangle her.

6 Q. Did he say how he was going to strangle her?

7 A. He was gonna use his belt.

8 Q. And did he say what he was going to do with the
9 belt?

10 A. He was gonna put it around her neck.

11 Q. And did he say he was going to use anything else
12 other than the belt?

13 A. No.

14 Q. Did -- did he tell you something about -- anything
15 about someone being gay?

16 MR. HOLMES: I'll object as leading.

17 THE COURT: Overruled.

18 BY MR. GARBER:

19 Q. Did he tell anything about someone being gay?

20 A. We had a conversation once.

21 Q. When was that?

22 A. A few months ago -- well, before that happened.

23 Q. A few months. And where was that conversation?

24 A. At my sister's.

25 MR. HOLMES: Object as being irrelevant, some
26 conversation a few months ago.

27 MR. GARBER: This relates to motive, your Honor.

28 THE COURT: Overruled. You may answer.

1 A. A few minutes.

2 Q. What happened when he came out of the room?

3 A. I think they left.

4 Q. Did either of them tell you where they were going
5 at that time?

6 A. No.

7 Q. About what time was it that they left?

8 A. 6:30.

9 Q. Was there any mention of a mall at that time?

10 MR. HOLMES: Objection as leading.

11 THE COURT: Overruled.

12 BY MR. GARBEN:

13 Q. Was there any mention of a mall at that time?

14 A. Rick was supposed to take a girl to the mall.

15 Q. And who told you that?

16 A. I don't remember.

17 Q. How long were they gone when they left at 6:30?

18 A. About an hour.

19 Q. What happened when they returned?

20 A. Mike came in and, uh, he put a purse on the table.

21 Q. What did he do then?

22 A. He dumped everything out of the purse and started
23 searching it.

24 Q. What did it -- where did he dump the purse?

25 A. On the coffee table.

26 Q. What did he do after he dumped the purse?

27 A. He threw a belt at me.

28 Q. Did he say anything at that time?

1 A. He told me the belt broke.

2 Q. What did he do then?

3 A. He showed me a picture.

4 Q. What kind of a picture was that?

5 A. It was an ID, high school ID.

6 Q. Was there a name on it?

7 A. Yes.

8 Q. What was the name?

9 A. Terri Winchell.

10 Q. Did he say anything at that time?

11 A. No.

12 Q. Did you notice anything about his hands at that
13 time?

14 A. They looked like he had blood on 'em.

15 MR. HOLMES: Object as speculation and conclusion. This
16 witness is not qualified.

17 THE COURT: Well, I think the witness is testifying about
18 an appearance, not a conclusion. Overruled.

19 BY MR. GARBER:

20 Q. Where was Rick Ortega at that time?

21 A. He was sitting down.

22 Q. And what was the next thing Mike did after that?

23 A. He went into the bathroom.

24 Q. Did you see what he was doing in the bathroom?

25 A. No.

26 Q. What did Rick do then?

27 A. I don't remember.

28 Q. Did you ever go outside?

- 1 A. Yes.
- 2 Q. Why did you go outside?
- 3 A. To look at the car.
- 4 Q. Did someone tell you to do that?
- 5 A. Yes.
- 6 Q. Who was that?
- 7 A. Mike.
- 8 Q. And what car was it you looked at?
- 9 A. Rick Ortega's.
- 10 Q. What kind of a car was that?
- 11 A. A Monte Carlo.
- 12 Q. What color was it?
- 13 A. A light green.
- 14 Q. What did you see in the car?
- 15 A. I opened the door and I seen a spot of blood.
- 16 Q. Where was the blood?
- 17 A. On the door.
- 18 Q. Did you see any other blood?
- 19 A. I don't remember.
- 20 Q. Did you go back into the residence?
- 21 A. Yes.
- 22 Q. And what happened when you went back into the
- 23 residence?
- 24 A. I sat down.
- 25 Q. What was Rick doing at that time?
- 26 A. He was in the kitchen.
- 27 Q. What was he doing in the kitchen?
- 28 A. I heard water running in the sink.

1 Q. Did you see anything in the sink?

2 A. No, I didn't.

3 Q. What was Mike doing at that time?

4 A. I don't remember.

5 Q. Did Mike tell you something about what had
6 happened?

7 A. Yes.

8 Q. What did he tell you?

9 A. He told me how he killed her.

10

11

-- S --

1 Q. And what did he say?

2 A. He said he tried to strangle her with -- with the
3 belt and it broke so he hit her over the head.

4 Q. Did he tell you what he hit her with?

5 A. With a hammer.

6 Q. Did he tell you what happened when he hit her with
7 the hammer?

8 A. She knocked out.

9 Q. Did he tell -- did he tell you how many times he
10 hit her?

11 A. I don't remember.

12 Q. Did he -- what else did he say about hitting her?

13 A. That he just kept hitting her, then he dragged her
14 out of the car.

15 Q. Did he say what he did with her after he dragged
16 her out of the car?

17 A. He left her in the vineyards.

18 Q. Did he tell you where the girl was when he started
19 to hit her?

20 A. She was in the front seat passenger.

21 Q. Passenger?

22 A. Yes.

23 Q. Did he tell you where he was?

24 A. Behind her.

25 Q. Did he tell you where -- if anyone else was in the
26 car?

27 A. Rick.

28 Q. Did he tell you where Rick was?

1 A. He was driving.

2 Q. Did he tell you something about knocking her out?

3 A. Yes.

4 Q. What did he say?

5 A. That he hit her with the hammer to knock her out.

6 Q. I am sorry?

7 A. He hit her with the hammer to knock her out.

8 Q. And did she knock out?

9 A. Yes.

10 Q. Did he say that that happened at first or -- or
11 what?

12 A. He said it took awhile.

13 Q. Did he say anything about her?

14 A. He just said she was a tough girl.

15 Q. Did he tell you what the girl was doing while this
16 was going on?

17 A. She was screaming for Rick.

18 Q. Did he say what she was screaming?

19 A. She --

20 MR. HOLMES: Object. That would be hearsay.

21 THE COURT: You are not offering this for the truth of
22 the matters --

23 MR. GARDNER: No, your Honor.

24 THE COURT: Again, ladies and gentlemen, you are going to
25 receive this statement solely for the fact that the statement
26 was made, not for the truth of the contents of the statement.

27 MR. HOLMES: I will object to the relevancy, then.

28 THE COURT: Overruled.

1 BY MR. GARDNER:

2 Q. Did he tell you what she was screaming?

3 A. Rick's name.

4 Q. Anything else?

5 A. Just told Rick to make him stop.

6 Q. Anything else?

7 A. No.

8 Q. When did you first find out that something was
9 going to happen to a girl?

10 A. I don't remember.

11 Q. Before that day did you have any idea this was
12 going to happen?

13 A. I don't remember.

14 Q. How long had you known Mike before this?

15 A. Seven months.

16 Q. What was your relationship with Mike?

17 A. He was my boyfriend.

18 Q. Do you see Mike in court today?

19 A. Yes.

20 Q. Would you point at him, please?

21 A. He is right there.

22 MR. GARDNER: May the record reflect she has identified
23 the defendant?

24 THE COURT: Yes.

25 MR. GARDNER: May I have People's Number 23, 58 and number
26 1?

27 Q. Raquel, I'd like to you take a look at People's
28 Number 1 and ask you if you recognize this photograph?

1 A. My -- my hammer.

2 Q. And why did you notice it was missing?

3 A. Because I was -- I was going to nail a picture that
4 was on the wall. I was going to nail it more in because it was
5 sticking out.

6 Q. Was there something else you noticed was missing?

7 A. My kitchen knife.

8 Q. And why did you notice that was missing?

9 A. Because there was a tool set on my -- on my stove
10 and I have two -- there was two knives similar and one -- one
11 was gone.

12 Q. Now, you say that Mike and Rick left.

13 About how long were they gone?

14 A. About an hour.

15 Q. What happened when they came back?

16 A. They came in the house and went in the kitchen
17 and --

18 Q. When Mike came in did he have anything with him?

19 A. Yes, he did.

20 Q. What did he have?

21 A. He had a -- the belt in his hand.

22 Q. Was there anything unusual about the belt?

23 A. Yes. It was broke.

24 Q. Would you like some water?

25 A. (Inaudible response.)

26 Q. Did you see what he did with the belt?

27 A. No, I didn't.

28 Q. What did he do after he came into the house?

1 A. He ran some water in the kitchen and then he went
2 back outside.

3 Q. Did you go outside?

4 A. Yes, I did.

5 Q. What did you see outside?

6 A. The car.

7 Q. And which car was that?

8 A. Rick's car.

9 Q. What did you see in the car?

10 A. There was blood in the car.

11 Q. Did Mike tell you anything about what happened?

12 A. Yes, he did.

13 Q. What did he say?

14 A. Well, after everybody left he said that he had put
15 a belt around someone's neck and then that it broke and then
16 he -- he hit her with the hammer and then -- then they took her
17 into a -- a field -- and he drug her out of the car and then
18 he -- he --

19 MR. HOLMES: Object to the narrative form of the answer.

20 THE COURT: The ~~objection~~ is overruled.

21 THE WITNESS: He said that he stabbed her and then he
22 said that he "fucked her".

23 Q. So -- are those his exact words?

24 A. Yes.

25 Q. Did he tell you where Rick was at that time?

26 A. He said that he told Rick to leave and then Rick
27 came back.

28 Q. Did you ever see the hammer again after you "

1 discovered it missing?

2 A. Yes, I did.

3 Q. Where was it?

4 A. On the counter.

5 Q. Was there anything unusual about it?

6 A. It is was wet.

7 Q. What about the knife?

8 Did you see that again?

9 A. Yes, I did.

10 Q. Was there anything unusual about the knife?

11 A. Yes. It was -- it was wet also.

12 Q. Where was the knife?

13 A. It was on the counter where the dishes were on the
14 left hand side.

15 Q. Was there anything different about the knife?

16 A. Yeah. It had a chip on the blade.

17 Q. Was that chip there the last time you had seen it?

18 A. No.

19 Q. Now, this was Wednesday -- or Thursday, January the
20 8th.

21 The day before, Wednesday, January 7th, did
22 something happen to you?

23 A. Yes.

24 Q. Where were you when it happened?

25 A. I was in my -- in my kitchen sitting down with my
26 back towards the living room.

27 Q. What happened?

28 A. Mike come up from behind me and he threw a belt

1 around my neck and he tightened it up a little bit. Not -- he
2 didn't really make it tight. And then I -- I took it off and I
3 asked him what he was doing.

4 Q. What did he say?

5 A. And he -- he said that he was practicing.

6 Q. Did he say anything else?

7 A. And I took -- and he goes -- I asked him, I said,
8 "Well, who are you going to do this to?"

9 He goes, "Never mind."

10 And I go, "Do I know him?"

11 He goes, "No. Neither do I."

12 Q. Do you see Mike in court today?

13 A. Yes, do I.

14 Q. Could you point on the at him, please?

15 A. He is right over there.

16 Q. How long had --

17 MR. GARBBER: Could the record reflect she has identified
18 the defendant?

19 THE COURT: Yes.

20 BY MR. GARBBER:

21 Q. How long had you known Mike Morales --

22 A. Not too long.

23 Q. -- before this?

24 And where had he been staying at that time?

25 A. In my house. He was staying in the main bedroom in
26 the house.

27 Q. How long had he been staying there?

28 A. I can't remember how long it was.

1 Q. -- the cat?

2 These rules that he had in his house when he was a
3 child, were any of those unreasonable rules?

4 A. I -- I'm not to judge whether those were reasonable
5 or unreasonable. I think they were very consistent in that
6 family, that his parents were doing what they thought was right.
7 And those were the rules of their church, and that's what they
8 wanted their children to abide by.

9 Q. Now, then, you started talking to the defendant
10 about the actual killing.

11 Did he tell you anything about the stabbing of the
12 victim?

13 A. Uh -- he told me that he did stab her.

14 Q. Did he say that was before or after the rape?

15 A. Well, I don't think that it was a rape, so I'd have
16 to change that.

17 Q. Okay.

18 A. What he told me was it was after he had sex.

19 Q. Okay. So we won't call that a rape?

20 A. Oh, you can call it a rape, but I don't see it as a
21 rape.

22 Q. All right. Well, let's call it sex for now.

23 He said that he had sex and then stabbed the
24 victim?

25 A. Yes, he did. That's accurate. What -- what he --
26 yes, that's accurate.

27 Q. All right. Was it during the sex act that he
28 stabbed the victim?

1 A. No.

2 Q. It was after?

3 A. That's correct.

4 Q. And had he actually gotten up off of her?

5 A. Yes, he had.

6 Q. Did you see any significance to the stabbing of the
7 victim?

8 A. Did I see significance? What did it mean to me?

9 Q. Yes, in view of the fact that he told you that
10 he -- in other words -- well, in view of the fact that you said
11 it was sex with maybe a dead body, --

12 A. Uh-huh.

13 Q. -- is there any significance to the fact that she
14 was stabbed?

15 A. Yes, I think there is.

16 Q. What significance is that?

17 A. What Michael told me was that after he got up, he
18 began to walk away because he thought that she was dead, but he
19 went back because he wasn't sure.

20 Q. Did he tell you why he did it then?

21 A. Why he did what?

22 Q. Why he stabbed her. Because he wasn't sure she was
23 dead?

24 A. That's correct.

25 Q. Okay. And did he tell you if he said anything to
26 her after that?

27 A. No, he did not.

28 Q. Didn't tell you anything about calling her a name

1 while she was laying there?

2 A. No, he did not.

3 Q. Did he tell you anything about hitting her with the
4 hammer?

5 A. Yes, he did.

6 Q. What did he say about that?

7 A. In what sense what did he say about that?

8 Q. Whatever -- anything he said about hitting her with
9 the hammer?

10 A. He said that -- let me go back.

11 He said that he put the belt around her neck, and
12 when it broke, he took the hammer out and he began hitting her
13 on the back of the head with the hammer.

14 Q. Did he tell you why he hit her so many times?

15 A. He said because she wasn't dying.

16 Q. And did he tell you if she was doing anything while
17 this happened?

18 A. He said that she was saying, "What are you doing?"

19 Q. Did he say anything else she was saying at that
20 time?

21 A. No, he did not.

22 Q. Did he tell you what Rick Ortega was doing at that
23 time?

24 A. Well, Rick Ortega was driving.

25 Q. Did he say if Rick said anything?

26 A. I -- I honestly, Counsel -- it seems -- I can't
27 remember whether he did or not.

28 Q. Did he tell you how many times he hit her?

1 A. No, he did not.

2 Q. Did he tell you what he did after he finished
3 hitting her with the hammer?

4 A. He -- what he told me was -- do you want me to tell
5 you what he said?

6 Q. Yes, please.

7 A. What he told me was that he took her out of the
8 car.

9 Q. And what did he say then? What else did he say?

10 A. Well, what he said was that he took her out of the
11 car and that he then took her into the vineyard.

12 Q. Did he say what happened to Rick at that point,
13 what Rick was doing?

14 A. Oh. Rick left at that point.

15 Q. And did he say what happened after he took her into
16 the vineyard?

17 A. I think I've already said that, what happened after
18 he took her in the vineyard.

19 Q. Did he tell you why he had sex with her?

20 A. He didn't know why he had sex with her.

21 Q. Did he tell you how long that took place?

22 A. He did. Not -- not very long.

23 Q. Did you ask him what he was thinking while this was
24 going on?

25 A. Yes, I did ask him what he was thinking.

26 Q. What did he tell you?

27 A. Nothing.

28 Q. Did you ask him what he was thinking during any

1 without parole.

2 I think that was made evident through the testimony
3 of Doctor Carson that a support system is necessary and I think
4 because of his peculiar economic and social environment that
5 such support system is present and that he can take advantage of
6 it and that they are willing to not ignore him or cast him
7 aside. They are willing to do -- Mrs. Morales doing the best
8 that she can within the limited period of time, it shows that
9 she is -- that there is somebody there willing to keep him on
10 the right track.

11 THE COURT: Pursuant to Section 190.4 of the Penal Code,
12 the Court is required to make a determination as to whether the
13 jury's findings and verdicts that the aggravating circumstances
14 outweigh the mitigating circumstances are contrary to law or to
15 the evidence presented.

16 The Court is then required to state on the record
17 the reason for his findings. In the particular case the Court
18 specifically agrees that the jury's findings and the
19 circumstances in aggravation outweigh the circumstances in
20 mitigation are supported by the weight of the evidence.

21 Further, the Court finds that the evidence
22 concerning the truth of the special circumstances is
23 overwhelming and the jury's assessment of the evidence that
24 aggravation outweighs mitigation as to the selection of the
25 proper penalty to be death is supported overwhelmingly by the
26 weight of the evidence.

27 In terms of credibility, the Court agrees with the
28 jury that the witnesses for the People were credible and

1 believable.

2 Penal Code Section 190.4 directs me to state on the
3 record my reasons for my findings and the reasons for my rulings
4 on this application and direct that they be entered on the
5 clerk's minutes.

6 I have examined and reviewed all of the evidence
7 that was presented to the jury, the trier of fact, in making its
8 determination as to the proper penalties. I have considered all
9 of the exhibits admitted into evidence as well as the defendant
10 during the proceedings, both on the guilt issue, the special
11 circumstances issue and the question of the issue of aggravation
12 or mitigation concerning the selection of which two penalties
13 would be appropriate.

14 I have also considered the argument of counsel
15 given to the jury at the guilt phase and the penalty phase and
16 the argument of counsel today at this, the automatic motion for
17 modification of the sentence, and the argument given by counsel
18 at the time the Court heard and denied the motion for new trial.

19 From all the evidence and argument of counsel, I am
20 satisfied beyond a reasonable doubt that, first, the defendant
21 is guilty of murder in the first degree, and also satisfied
22 beyond a reasonable doubt that the special circumstances are
23 true.

24 In other words, I find there is absolutely no
25 question as to the guilt of the defendant or as to the truth of
26 the special circumstances.

27 I personally find that there have been proved
28 beyond a reasonable doubt in the penalty phase the following

1 additional crimes of the defendant: That on January 12th, 1981,
2 the defendant, Michael Angelo Morales robbed Abdoun Abdoun --
3 that is, robbed Abdoun Abdoun and Anam Abdoun;

4 And, further, that on August 8th, 1979, the
5 defendant, Michael Angelo Morales, committed the crime of
6 burglary.

7 In reconsidering the material offered in the
8 penalty phase by the defense, I further find beyond a reasonable
9 doubt that there was no circumstance which extenuated the
10 gravity of the crime whether or not it be a legal excuse.

11 None of the witnesses called could offer any
12 explanation or give any evidence of any conceivable circumstance
13 that the Court would find would extenuate the gravity of this
14 crime.

15 The evidence which the defendant offered concerning
16 the defendant's extenuation was merely as to his background and
17 certain mental pressures that tended to explain but not excuse
18 his conduct.

19 The members and friends of the defendant's family
20 who testified did not, in the Court's, opinion present any
21 evidence which the Court would find to be a moral justification
22 or extenuation for his conduct.

23 I further find in evaluating the evidence at the
24 penalty phase, in addition to the circumstances of the crimes of
25 which the defendant was convicted and the existence of the
26 special circumstances found to be true, that there were no
27 factors in mitigation, or if there were factors in mitigation,
28 that they are not or do not outweigh those in aggravation.

1 I find that the defendant did not commit the murder
2 while acting under extreme duress or under the substantial
3 domination of another person.

4 I find that the defendant's age of 21 years at the
5 time of the murder may tend to be somewhat mitigating.

6 I find that the victim did not participate in the
7 defendant's homicidal conduct, nor did she consent to the
8 conduct.

9 I am satisfied that there were no circumstances
10 which the defendant could reasonably believe to be a moral
11 justification or extenuation for his conduct.

12 I further find that there was no absence of any
13 felony convictions. To the contrary, there is presence of two
14 prior felony convictions.

15 I further find that there are no circumstances
16 which extenuate the gravity of the crime, even though it not be
17 termed a legal excuse.

18 And I find that the defendant's capacity to
19 appreciate the criminality of his conduct and his capacity to
20 conform his conduct to the requirements of law were in no way
21 impaired as a result of mental disease, defect or the effect of
22 any intoxicants or drugs or a combination thereof.

23 I acknowledge as a circumstance in mitigation the
24 evidence of the defendant's remorse and further his
25 susceptibility to rehabilitation.

26 And, further, the love and concern that he has for
27 his children, his religious faith and the fact that there are
28 people in the community, including members of his family, who

1 would provide encouragement and support in his being productive
2 in his artwork.

3 But I find that those circumstances do not outweigh
4 the circumstances in aggravation.

5 The totality of the conduct of the defendant toward
6 the victim of the crime shows a high degree of cruelty,
7 callousness and viciousness.

8 Accordingly, considering all of the evidence, my
9 personal assessment is that the factors in aggravation beyond a
10 reasonable doubt outweigh those in mitigation. And the
11 automatic motion for modification of the jury's verdict of death
12 as to the defendant is denied.

13 I hereby direct a transcript to be made of these
14 reasons for denying the automatic motion for modification of the
15 jury's verdict as to death and these reasons be entered in the
16 clerk's minutes.

17 Are the parties prepared to go forward with the
18 sentencing at this time?

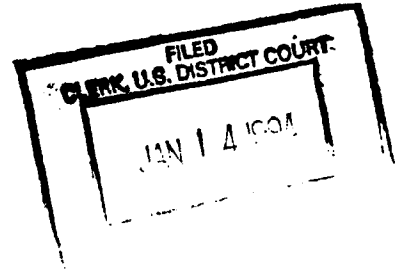
19 MR. HOLMES: Yes.

20 THE COURT: In connection with the issue of sentence,
21 there are a couple of threshold matters that I think I'd like to
22 discuss before I hear any evidence, if the parties have any
23 additional evidence or hear argument.

24 First of all, it appears to me that -- that the
25 probation officer is incorrect on the conspiracy charge. The
26 probation officer feels that that's a capital offense, or in the
27 situation of this case is a capital offense. I do not think so.

28 MR. GARBER: I agree with the Court.

COPY



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DEATH PENALTY
UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES,)	CASE NO. CV 91-0682 DT
)	
Petitioner,)	FIRST AMENDED
)	PETITION FOR WRIT OF
v.)	HABEAS CORPUS
)	
DANIEL VASQUEZ, as)	
Warden of San Quentin)	
State Prison,)	
)	
Respondent.)	

Petitioner Michael Angelo Morales, by and through his
counsel Condon & Forsyth, files this first amended petition for
writ of habeas corpus pursuant to 28 U.S.C. section 2254 and
alleges as follows:

//
//
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//
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//
//

STATEMENT OF THE CASE

1
2
3 1. This first amended petition concerns a
4 conviction and a sentence. Petitioner is detained at the
5 California State Prison at San Quentin under sentence of death.

6 2. The conviction on which the petition is based
7 involved conspiracy to commit murder, California Penal Code
8 section 182; murder, California Penal Code section 187; and
9 forcible rape, California Penal Code section 261.2.

10 The sentencing court was the Ventura County Superior
11 Court, 800 South Victoria Avenue, Ventura, California 93009
12 (hereinafter "court"). People v. Morales, Case No. 17960.
13 Petitioner entered a plea of not guilty, and did not testify at
14 trial.

15 On April 7, 1983, the jury convicted petitioner of
16 first degree murder, conspiracy to commit murder, and rape, and
17 found true the two special circumstances of torture and lying-
18 in-wait. On April 19, 1983, the court set aside the jury's
19 finding that the murder involved the infliction of torture as
20 being wholly unsupported by the evidence. The penalty trial
21 was conducted before the same jury and it returned a verdict of
22 death on April 25, 1983. On June 14, 1983, petitioner received
23 a sentence of death regarding Penal Code section 187 - murder
24 in the first degree; 25 years to life regarding Penal Code
25 section 182 - conspiracy to commit murder; and eight years
26 regarding Penal Code section 261.2 - forcible rape.

27 3. Petitioner appealed from the conviction of
28 sentence to the California Supreme Court which affirmed the

1 conviction and sentence on June 1, 1989. People v. Morales, 48
2 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64 (1989). Justices
3 Mosk and Broussard dissented. Justice Mosk concurred in the
4 affirmance of the judgment as to guilt; however, he stated "the
5 special circumstance findings . . . and the judgment of death"
6 were "unsupported as a matter of law" in that: (1) the
7 defendant's physical concealment is and must be, an established
8 element for the special circumstance of lying-in-wait; and (2)
9 the court did not abuse its discretion in setting aside the
10 torture finding based upon insufficient evidence. Id. at 573-
11 74, 577. Justice Broussard dissented on the grounds that
12 defendant made a prima facie showing that there was a
13 substantial underrepresentation of Hispanics on his jury
14 venire, and therefore, he was deprived of his Sixth Amendment
15 right to a jury composed of a representative cross section of
16 the community.

17 Petitioner raised the following grounds on appeal:

18 (a) The convictions must be reversed because the
19 Ventura County process for the formation of jury pools deprived
20 appellant of his right to a jury drawn from a representative
21 cross section of the community;

22 (b) The court erroneously instructed the jury that
23 lying-in-wait within the meaning of Penal Code section
24 190.2(a)(15) could be found if the defendant's purpose was
25 concealed, even in the absence of actual or attempted physical
26 concealment of the defendant's person;

27 (c) Even if the instructions on lying-in-wait were
28 correct, there is insufficient evidence that the murder was

1 committed while the defendant was lying-in-wait or that the
2 victim was taken unawares;

3 (d) The Penal Code section 190.2(a)(15) finding must
4 be reversed because the prosecution failed to establish the
5 corpus delicti of the special circumstance;

6 (e) The court erred in admitting evidence of out-of-
7 court statements of co-defendant Ortega that petitioner would
8 participate in a murder of Randy Blythe;

9 (f) The court's failure to instruct that Penal Code
10 section 190.2(a)(18) requires an intent to inflict pain
11 mandates reversal of the torture murder special circumstance
12 finding;

13 (g) The first degree murder conviction must be
14 reversed because the jury improperly was instructed on lying-
15 in-wait, because there is insufficient evidence to justify
16 giving the lying-in-wait instructions, and because there is
17 insufficient evidence to justify giving the torture murder
18 instructions;

19 (h) The evidence fails to establish the corpus
20 delicti of rape; the rape conviction must therefore be
21 reversed;

22 (i) The rape conviction must be reversed because the
23 court failed to instruct the jury that the testimony of Bruce
24 Samuelson should be viewed with distrust because Samuelson was
25 a criminal informant;

26 (j) The trial court's refusal to order sequestration
27 of the jury during penalty phase deliberations upon request of
28 the petitioner requires reversal of the penalty phase decision;

1 (k) The court's failure to admonish the jury at
2 adjournment during penalty phase deliberations requires
3 reversal of the penalty phase decision;

4 (l) The court's failure to instruct the jury that
5 evidence of other crimes in aggravation must be proved beyond a
6 reasonable doubt is reversible error;

7 (m) The court erred in admitting evidence of two
8 convictions which were entered after the commission of the
9 murder in this case;

10 (n) The court erred in instructing the jury that the
11 mental or emotional disturbance in Penal Code section 190.3(d)
12 and the duress in Penal Code section 190.3(g) must be "extreme"
13 in order to constitute a mitigating factor;

14 (o) The penalty decision must be reversed because
15 the jury erroneously was allowed to consider the invalid
16 torture special circumstance and the constitutionally
17 irrelevant factor of the victim's subjective experience of pain
18 as aggravating factors;

19 (p) The court's failure to instruct the jury at the
20 penalty phase that it should view extrajudicial statements of
21 petitioner with caution constitutes reversible error;

22 (q) The court erred in failing to reinstruct the
23 jury that no adverse inference should be drawn from
24 petitioner's failure to testify and that evidence of his oral
25 admission introduced at the guilt phase should be viewed with
26 caution at the penalty phase;

27 (r) The penalty phase verdict must be reversed
28 because of errors committed in the guilt phase pertaining to

1 the extrajudicial statements of co-defendant Ortega and the
2 extrajudicial statements of petitioner allegedly made to
3 informant Bruce Samuelson;

4 (s) The prosecutor committed prejudicial misconduct
5 in his penalty phase argument by repeated reference to
6 petitioner's failure to express remorse;

7 (t) The prosecutor committed prejudicial misconduct
8 in his penalty phase argument by his inflammatory demonstration
9 of the use of the hammer; and

10 (u) The court relied on erroneous factors in
11 aggravation and on inadmissible evidence, and failed to
12 consider evidence in mitigation in denying petitioner's motion
13 pursuant to Penal Code section 190.4(e).

14 On April 19, 1983, prior to the commencement of the
15 penalty phase, the court granted petitioner's motion for new
16 trial on the grounds that there was insufficient evidence to
17 support the jury's finding of first-degree murder by torture.
18 This order was reconsidered and vacated by the court after the
19 penalty phase in response to the prosecution's request. The
20 court then entered a judgment n.o.v. as to the first-degree
21 torture murder finding at the request of petitioner's counsel.
22 The People filed a cross-appeal from this ruling, and the
23 California Supreme Court set aside the judgment n.o.v. People
24 v. Morales, 48 Cal. 3d 527, 560, 770 P.2d 244, 257 Cal. Rptr.
25 64 (1989).

26 4. Petitioner sought a writ of certiorari from the
27 United States Supreme Court on the following grounds:

28 (a) Petitioner's death sentence must be reversed

1 because his accomplice's hearsay declaration of his and
2 petitioner's intent to commit two murders, one by torture and
3 lying-in-wait, was presented to the jury in violation of the
4 confrontation clause;

5 (b) The court's failure to instruct on intent to
6 inflict pain in connection with the torture special
7 circumstance deprived petitioner of due process; and

8 (c) California's lying-in-wait special circumstance
9 violates the Eighth Amendment because it permits imposition of
10 the death penalty where the defendant merely conceals his
11 purpose instead of requiring physical concealment.

12 The United States Supreme Court denied the petition
13 for writ of certiorari on November 27, 1989. Morales v.
14 California, 493 U.S. 984, 110 S. Ct. 520, 107 L. Ed. 2d 520
15 (1989).

16 On December 16, 1992, petitioner filed a petition for
17 writ of habeas corpus in the California Supreme Court, and on
18 April 19, 1993, petitioner filed a supplemental petition,
19 presenting evidence and raising additional issues of fact not
20 contained in the record on the direct appeal, including:

21 (a) Petitioner's counsel rendered ineffective
22 assistance of counsel at the guilt phase and the penalty phase
23 of trial in violation of petitioner's rights under the state
24 and federal constitutions when he unreasonably failed to
25 present sufficient statistical evidence to make a prima facie
26 showing of systematic exclusion of Hispanics from the jury
27 venire to petitioner's substantial prejudice;

28 (b) Petitioner's counsel rendered ineffective

1 assistance of counsel at the guilt phase and the penalty phase
2 of trial in violation of petitioner's rights under the state
3 and federal constitutions when he unreasonably failed during
4 voir dire to adequately investigate the ideas, philosophies,
5 backgrounds, experiences, knowledge, demeanor, beliefs, and
6 attitudes of the prospective jurors in petitioner's jury
7 venires to petitioner's substantial prejudice;

8 (c) Petitioner's sentence has been arbitrarily and
9 capriciously imposed in violation of petitioner's rights under
10 the state and federal constitutions in that the capital charge
11 against petitioner was an aberration from the typical non-
12 capital disposition reached in the vast majority of similar
13 cases in San Joaquin County since the reenactment of the death
14 penalty in 1977;

15 (d) Petitioner's counsel rendered ineffective
16 assistance of counsel at the guilt phase and the penalty phase
17 of trial in violation of petitioner's rights under the state
18 and federal constitutions when he unreasonably failed to object
19 to and/or challenge the arbitrary, capricious, and racially
20 motivated capital charges against petitioner by the San Joaquin
21 County District Attorney to petitioner's substantial prejudice;

22 (e) Petitioner's counsel rendered ineffective
23 assistance of counsel at the guilt phase of trial in violation
24 of petitioner's rights under the state and federal
25 constitutions when he unreasonably failed to adequately
26 investigate and present facts regarding petitioner's prolonged
27 use of phencyclidine supporting a legal defense to the crimes
28 to petitioner's substantial prejudice;

1 (f) Petitioner's counsel rendered ineffective
2 assistance of counsel at the penalty phase in violation of
3 petitioner's rights under the state and federal constitutions
4 when he unreasonably failed to adequately investigate and
5 present facts regarding petitioner's phencyclidine use as
6 mitigation for the crimes of which he was convicted;

7 (g) Petitioner's counsel rendered ineffective
8 assistance of counsel at the guilt phase of trial in violation
9 of petitioner's rights under the state and federal
10 constitutions when he unreasonably failed to adequately
11 investigate and present facts regarding petitioner's alcohol
12 intoxication at the time of the offense supporting a legal
13 defense to the crimes to petitioner's substantial prejudice;

14 (h) Petitioner's counsel rendered ineffective
15 assistance of counsel at the penalty phase in violation of
16 petitioner's rights under the state and federal constitutions
17 when he unreasonably failed to adequately investigate and
18 present facts regarding petitioner's alcohol intoxication at
19 the time of the offense as mitigation for the crimes of which
20 he was convicted;

21 (i) Petitioner's counsel rendered ineffective
22 assistance of counsel at the guilt phase and penalty phase in
23 violation of petitioner's rights under the state and federal
24 constitutions when he unreasonably failed to adequately
25 investigate and present facts of petitioner's commingling
26 phencyclidine and alcohol in support of a legal defense to the
27 crimes, and/or as mitigation for the crimes, to petitioner's
28 substantial prejudice;

1 (j) Petitioner's counsel rendered ineffective
2 assistance of counsel at the guilt phase of trial in violation
3 of petitioner's rights under the state and federal
4 constitutions when he unreasonably failed to adequately
5 investigate, learn, and present an alibi defense to the crimes
6 to petitioner's substantial prejudice;

7 (k) Petitioner's counsel rendered ineffective
8 assistance of counsel at the guilt phase in violation of
9 petitioner's rights under the state and federal constitutions
10 when he failed to investigate and present facts and expert
11 testimony supporting a defense to the crime of rape to
12 petitioner's substantial prejudice;

13 (l) Petitioner's counsel rendered ineffective
14 assistance of counsel at the guilt phase in violation of
15 petitioner's rights under the state and federal constitutions
16 when he unreasonably failed to adequately investigate and
17 present forensic evidence supporting a defense to the crimes to
18 petitioner's substantial prejudice;

19 (m) Petitioner's counsel rendered ineffective
20 assistance of counsel at the guilt phase in violation of
21 petitioner's rights under the state and federal constitutions
22 when he unreasonably failed to adequately investigate,
23 challenge, and/or impeach the tangible evidence presented by
24 the prosecution which would have supported a defense to the
25 crimes to petitioner's substantial prejudice;
26
27
28

1 (n) Petitioner's counsel rendered ineffective
2 assistance of counsel at the guilt phase of trial in violation
3 of petitioner's rights under the state and federal
4 constitutions when, without the consent of petitioner, he
5 unreasonably made concessions regarding the prosecution's
6 burden of proof with respect to elements of the crime of
7 murder, as well as the meaning of certain evidence presented by
8 the prosecution to petitioner's substantial prejudice;

9 (o) Petitioner's counsel rendered ineffective
10 assistance of counsel at the guilt phase and penalty phase of
11 trial in violation of petitioner's rights under the state and
12 federal constitutions when he unreasonably failed to address
13 and argue the evidence which was favorable to petitioner during
14 his closing argument to petitioner's substantial prejudice;

15 (p) Petitioner's rights under the state and federal
16 constitutions were violated by the combined actions of the
17 prosecutor and the prosecution's star criminal informant
18 witness in failing to disclose, inter alia, the substantial
19 benefits conferred on the witness and the arrangement through
20 which the witness' expectation of the substantial benefits was
21 created;

22 (q) Petitioner's rights under the state and federal
23 constitutions were violated by the prosecution's knowing use of
24 false testimony by the prosecution's star criminal informant
25 witness to petitioner's substantial prejudice;

26 (r) Petitioner's rights under the state and federal
27 constitutions were violated by the prosecution's use of the
28 star criminal informant witness as a government agent to elicit

1 a confession from petitioner after his arrest to the prejudice
2 of petitioner;

3 (s) Petitioner's counsel rendered ineffective
4 assistance of counsel in violation of petitioner's rights under
5 the state and federal constitutions when he unreasonably failed
6 to adequately investigate and present facts to impeach the
7 false testimony of the prosecution's star criminal informant
8 witness, and failed to request an instruction that the
9 testimony of a criminal informant should be viewed with
10 distrust, to petitioner's substantial prejudice;

11 (t) Petitioner's rights under the state and federal
12 constitutions were violated by the combined actions of the
13 prosecutor and the prosecution's star witness in failing to
14 disclose, inter alia, the substantial benefits conferred on the
15 witness and the arrangement through which the witness'
16 expectation of the substantial benefits was created;

17 (u) Petitioner's rights under the state and federal
18 constitutions were violated by the prosecution's knowing use of
19 false testimony by Pat Flores, one of the prosecution's star
20 witnesses, to petitioner's substantial prejudice;

21 (v) Petitioner's rights under the state and federal
22 constitutions were violated by the prosecution's knowing use of
23 false testimony by Raquel Cardenas, one of the prosecution's
24 star witnesses, to petitioner's substantial prejudice;

25 (w) Petitioner's counsel rendered ineffective
26 assistance of counsel in violation of petitioner's rights under
27 the state and federal constitutions when he unreasonably failed
28 to investigate and present facts to impeach the false testimony

1 of the prosecution's star witnesses, Pat Flores and Raquel
2 Cardenas, to petitioner's substantial prejudice;

3 (x) Petitioner's counsel rendered ineffective
4 assistance of counsel at the guilt phase of trial in violation
5 of petitioner's rights under the state and federal
6 constitutions when he unreasonably failed to adequately
7 investigate, learn, and present to the court the law regarding
8 the torture special circumstance to petitioner's substantial
9 prejudice;

10 (y) Petitioner's counsel rendered ineffective
11 assistance of counsel at the guilt phase of trial in violation
12 of petitioner's rights under the state and federal
13 constitutions when he failed to investigate and present facts
14 and expert testimony supporting a defense to the first-degree
15 murder torture theory and the torture special circumstance to
16 petitioner's substantial prejudice;

17 (z) Petitioner's counsel rendered ineffective
18 assistance of counsel at the guilt phase of trial in violation
19 of petitioner's rights under the state and federal
20 constitutions when he unreasonably failed to adequately
21 investigate and present facts supporting a legal defense to the
22 lying-in-wait special circumstance and the lying-in-wait first-
23 degree murder theory to petitioner's substantial prejudice;

24 (aa) Petitioner's counsel rendered ineffective
25 assistance of counsel at the penalty phase of trial in
26 violation of petitioner's rights under the state and federal
27 constitutions when he unreasonably failed to adequately
28 investigate and present facts regarding petitioner's mental

1 health background as mitigation for the crimes of which he was
2 convicted to petitioner's substantial prejudice;

3 (bb) Petitioner's counsel rendered ineffective
4 assistance of counsel at the penalty phase of trial in
5 violation of petitioner's rights under the state and federal
6 constitutions when he unreasonably failed to adequately
7 investigate and present facts supporting mitigation for the
8 crimes of which he was convicted;

9 (cc) Petitioner's counsel rendered ineffective
10 assistance of counsel at the penalty phase of trial in
11 violation of petitioner's rights under the state and federal
12 constitutions when he unreasonably failed to provide
13 information to, communicate with, prepare, and/or request
14 expert analysis from, petitioner's mental health expert with
15 respect to the mitigation issues for the crimes of which
16 petitioner was convicted;

17 (dd) Petitioner's counsel rendered ineffective
18 assistance of counsel at the penalty phase of trial in
19 violation of petitioner's rights under the state and federal
20 constitutions when he unreasonably failed to investigate,
21 learn, and/or present to the court the law regarding the
22 admissibility of evidence of other crimes allegedly committed
23 by petitioner;

24 (ee) Petitioner's counsel rendered ineffective
25 assistance of counsel at the penalty phase of trial in
26 violation of petitioner's rights under the state and federal
27 constitutions when he unreasonably failed to object to the
28 prosecutor's prejudicial remarks to petitioner's substantial

prejudice;

1
2 (ff) The first-degree murder conviction is in
3 violation of petitioner's rights under the state and federal
4 constitutions because the jury improperly was instructed on
5 lying-in-wait, there was insufficient evidence to justify
6 giving the lying-in-wait instructions, there was insufficient
7 evidence to justify the torture murder theory, and the request
8 for a special finding on the premeditation and deliberation
9 issue was improper;

10 (gg) Petitioner's counsel rendered ineffective
11 assistance of counsel at the guilt and penalty phase of trial
12 in violation of petitioner's rights under the state and federal
13 constitutions because counsel was unprepared, inexperienced,
14 and lacked the requisite ability to provide a reasonably
15 adequate defense for petitioner with respect to the crimes of
16 which he was convicted to petitioner's substantial prejudice;

17 (hh) Petitioner's rights under the state and federal
18 constitutions were violated by the combined actions of the
19 prosecutor and the prosecution's pathologist in failing to
20 disclose, inter alia, prior inconsistent sworn testimony of the
21 pathologist at a capital murder trial;

22 (ii) Petitioner's rights under the state and federal
23 constitutions were violated by the prosecution's knowing use of
24 false testimony by the prosecution's pathologist to
25 petitioner's substantial prejudice; and

26 (jj) Petitioner's counsel rendered ineffective
27 assistance of counsel at the guilt phase of trial in violation
28 of petitioner's rights under the state and federal

1 constitutions when he unreasonably failed to adequately
2 investigate and present facts to impeach the false testimony of
3 the prosecution's pathologist to petitioner's substantial
4 prejudice.

5 On July 28, 1993, the California Supreme Court denied
6 these claims, with Justice Mosk dissenting in favor of the
7 issuance of an order to show cause.

8 5. Petitioner sets forth hereinafter concisely each
9 ground for each claim, summarizing briefly the facts supporting
10 each ground as follows:

11
12 1. Discriminatory Charging Practices

13 A. Petitioner was denied his Fifth, Sixth, Eighth, and
14 Fourteenth Amendment rights because between 1979 and 1981, the
15 District Attorney was enforcing discriminatory charging
16 practices: practices which were used against this particular
17 petitioner in this case. Upon receipt of adequate funds
18 reasonably necessary to fully investigate this claim, and after
19 having a full and fair opportunity to develop this claim
20 through investigation, discovery, expert analysis, and
21 evidentiary hearings, the following facts, among others, will
22 be presented to support this claim:

23 1. In California, a defendant only is eligible for the
24 death penalty if the jury finds the defendant guilty of first-
25 degree murder, and finds at least one "special circumstance"
26 charged by the prosecution to be true. See Cal. Penal Code §§
27 190, 190.1, 190.2 (West 1993). The charging of a defendant
28 with a special circumstance allegation, thereby making the

1 arbitrary, capricious, and discriminatory capital charges
2 against petitioner; and

3 (c) If the proper defense had been tendered, it is
4 reasonably probable that no capital charges would have been
5 made against petitioner, or that the capital charges would have
6 been dismissed as an arbitrary and capricious action, and/or a
7 discriminatory action motivated by race, gender, and/or age in
8 violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth
9 Amendment rights.

10
11 4. Failure to Disclose Material Evidence (Samuelson)

12 A. Petitioner's Fifth, Sixth, Eighth, and Fourteenth
13 Amendment rights were violated by the combined actions of the
14 prosecutor and the prosecution's star criminal informant
15 witness in failing to disclose, inter alia, the substantial
16 benefits conferred on the witness and the arrangement through
17 which the witness' expectation of the substantial benefits was
18 created. Upon receipt of adequate funds reasonably necessary
19 to fully investigate this claim, and after having a full and
20 fair opportunity to develop this claim through investigation,
21 discovery, expert analysis, and evidentiary hearings, the
22 following facts, among others, will be presented to support
23 this claim:

24 1. Bruce Samuelson received numerous benefits from the
25 prosecution in exchange for his testimony against petitioner,
26 including the dismissal of four pending felony charges, and the
27 reinstatement of probation on a felony burglary probation
28 violation. Samuelson lied to the jury, the court, and

1 petitioner when he denied receiving such prosecutorial favors.

2 The prosecution failed to correct his false testimony:

3 (a) Bruce Samuelson, a jail-house informant who
4 allegedly obtained a confession from petitioner, was a key
5 witness in proving the case against petitioner. The District
6 Attorney's file in the Samuelson case contains the following
7 handwritten notation: "D[efendant] is a key witness in
8 prov[ing] Michael Morales 187 w/ specials", and "see BG [Deputy
9 District Attorney Bernard Garber] re dispo[sition] on this".
10 District Attorney's Position Sheet, Exhibit "A" hereto.
11 Bernard Garber was the prosecutor in charge of both Samuelson's
12 and petitioner's cases. Respondent does not dispute that
13 Samuelson was a critical witness for the prosecution;

14 (b) Without Samuelson's testimony, the District
15 Attorney only had minimal circumstantial evidence, based
16 entirely upon statements purportedly made by petitioner to two
17 other witnesses, Flores and Cardenas, who received numerous
18 favors from the prosecution in exchange for their testimony,
19 that: (1) petitioner was with co-defendant Ricky Ortega, a
20 person who not only was convicted of murdering the victim, but
21 also had the sole motive to murder the victim, at the time of
22 the victim's death; (2) petitioner ever was in the presence of
23 the victim at any time; (3) petitioner ever was in Ortega's
24 car, the place where the attack purportedly occurred; (4)
25 petitioner intended, with premeditation, deliberation and by
26 lying-in-wait, to murder the victim; and (5) petitioner
27 attempted to strangle the victim;
28

1 (c) Moreover, without Samuelson's testimony, the
2 District Attorney had no evidence that a sexual act was
3 committed upon the victim by petitioner while the victim was
4 alive, thereby forming the sole evidentiary basis of the rape
5 charge and conviction against petitioner. The rape conviction
6 was an extremely prejudicial and aggravating factor that was
7 considered by the jury against petitioner in determining his
8 sentence;

9 (d) Petitioner was arrested and incarcerated at the
10 San Joaquin County Jail on January 10, 1981. Almost two years
11 later, on November 3, 1982, Samuelson was arrested in Kingman,
12 Arizona (Exhibit "B" hereto), and was extradited to Stockton,
13 California to face six felony charges, including: (1) auto
14 theft under section 10851 of the Vehicle Code; (2) two counts
15 of receiving stolen property under Penal Code section 496; and
16 (3) three counts of forgery under Penal Code section 470.
17 Amended Complaint, Exhibit "C" hereto. This arrest also
18 constituted a violation of Samuelson's probation which was
19 established upon his June 2, 1982 release from jail for a
20 felony burglary conviction. RT 2351. Samuelson arrived in
21 Stockton and was incarcerated at the San Joaquin County Jail on
22 November 10, 1982. RT 2333; Stockton Police Department
23 Subsequent Report, December 17, 1982, Exhibit "D" hereto
24 (["He] was returned to Stockton from Kingman, Arizona on 11-10-
25 82");

26 (e) On November 24 or 25, 1982, petitioner
27 purportedly gave a confession to Samuelson regarding various
28 aspects of the subject crime while they were incarcerated in

1 adjacent cells at the San Joaquin County Jail. Stockton Police
2 Department Subsequent Report, December 17, 1982, Exhibit "D"
3 hereto ["SAMUELSON advised that on either Thanksgiving night or
4 the night before Thanksgiving [i.e., November 24 or 25, 1982]
5 that MORALES had talked to him about the killing of Terri
6 WINCHELL."];⁵

7 (f) Samuelson testified at the guilt phase of trial
8 that petitioner made the following statements to him at the San
9 Joaquin County Jail:

- 10 (1) Ortega, petitioner, and the victim were in a car
11 headed towards Lodi (RT 2336);
- 12 (2) As they were driving, petitioner attempted to
13 strangle the victim with his belt (RT 2337);
- 14 (3) The belt broke during this act (RT 2337);
- 15 (4) The victim became unconscious (RT 2337);
- 16 (5) Petitioner then hit the victim in the head with
17 a hammer numerous times (RT 2337-38);
- 18 (6) Petitioner told Ortega to stop the car, and he
19 then dragged the victim to a field and raped her
20 (RT 2338);

21
22
23 ⁵ Samuelson later told the jury a different story when
24 he testified that this confession began on November 15, 1982
25 and continued for two weeks. RT 2340. Counsel failed to use
26 the police report at trial to impeach the witness regarding
27 this contradiction. Moreover, counsel also failed to call as a
28 witness the police officer who prepared the police report to
undermine Samuelson's false testimony. This fact is hereby
incorporated by reference into petitioner's claim no. 7 as
further evidence of counsel's lack of preparation and
ineffective assistance in response to the prosecution's use of
this snitch witness.

1 (7) Petitioner then stabbed the victim about four
2 times (RT 2338);

3 (8) Petitioner returned to his residence, washed the
4 hammer and knife, and hid the knife in the
5 refrigerator (RT 2339-40);

6 (g) This testimony was highly inflammatory and it
7 graphically incriminated petitioner. It provided the only
8 evidence necessary to establish petitioner's purported sexual
9 assault of the victim while she still was alive, and the only
10 evidence other than Cardenas' and Flores' testimony, two
11 witnesses who admittedly received numerous prosecutorial favors
12 and/or immunity for their testimony, of petitioner's purported
13 intent, premeditation, and lying-in-wait to commit murder, and
14 his purported commission of a murder;⁶

15 (h) Samuelson denied any reward, promise of
16 leniency, expectation of leniency, or other benefits from the
17 prosecution in return for his testimony, other than a
18 recommendation by the prosecution for one year of county jail
19 time. Specifically, Samuelson testified:

20 Q. Now, in exchange for your agreeing to testify,

21 ⁶ This testimony, while inflammatory and prejudicial to
22 petitioner, also wholly was contradictory of other evidence
23 introduced by the prosecution at trial, including: (1) the
24 absence of trauma to the victim's neck, which would have
25 occurred if a strangulation attempt was made (RT 1834-35); (2)
26 the absence of petitioner's fingerprints in the car, which
27 would have been present had petitioner been in Ortega's car (RT
28 2038-42); (3) the fact that a hammer, not a knife, was found in
the refrigerator (RT 1956-57); (4) the absence of a PGM sub-
type 2+1+ in the semen found in the victim exonerates
petitioner as the donor of the semen found in the victim (RT
2136); and (5) the defense wounds on the victim's arms indicate
that she was not unconscious when struck with a blunt
instrument (RT 1782).

1 have you been offered anything from the San
2 Joaquin County District Attorney's office?

3 A. It was stated that they would recommend a one-
4 year county jail sentence with a felony
5 conviction.

6 Q. As opposed to what?

7 A. Going to state prison.

8 RT 2341-42 (emphasis added).

9 On cross-examination, Samuelson reiterated:

10 Q. And you have in fact been given a promise by the
11 prosecution, have you not?

12 A. For a recommendation.

13 Q. Okay. And that recommendation is a year in the
14 county jail, right?

15 A. Yes, sir.

16 RT 2371-72 (emphasis added);

17 (i) In summary, according to Samuelson, the District
18 Attorney did not promise Samuelson anything, but would only
19 recommend that he serve one year in county jail for the five
20 felony charges and the probation violation that were pending
21 against him rather than simply "going to state prison."⁷ RT
22 2351. In light of the foregoing, it is unlikely that the jury
23 would have believed that the District Attorney's

24
25 ⁷ Six felony charges were filed against Samuelson on
26 November 12, 1982; one of these charges was dismissed after the
27 February 2, 1983 preliminary hearing. Either this was not
28 disclosed to counsel, or counsel failed to investigate and
learn of same; but in either event, the reduction of six felony
charges to five, which was referred to by Samuelson during his
testimony (RT 2332-33), was not addressed by counsel or the
District Attorney at trial.

1 "recommendation" would be accepted by the court, or that
2 Samuelson would receive a one-year sentence in county jail,
3 because: (1) there were five felony charges and a felony
4 probation violation pending against him; (2) the District
5 Attorney purportedly was not offering to dismiss or reduce any
6 of these charges; (3) Samuelson was exposed to a thirteen year
7 state prison sentence as a result of these charges; and (4) the
8 District Attorney purportedly had not obtained the court's
9 confirmation that Samuelson would receive a local disposition
10 for the six felony charges and the probation violation on a
11 felony burglary conviction;

12 (j) In fact, Samuelson's testimony and the
13 representations by law enforcement officials to counsel were
14 false, i.e., false in numerous respects;

15 (k) Prior to Samuelson's testimony, and while
16 Samuelson was representing himself in propria persona, the
17 prosecution personally gave Samuelson assurances, both in
18 writing and on the record in court that, in exchange for his
19 testimony, four of the six felony charges would be dismissed,
20 and that the prosecution not only would recommend, but already
21 had recommended and obtained the court's position on the
22 remaining two felony charges; to wit, Samuelson only would have
23 to serve time, if any, locally in the county jail;

24 (1) These assurances are set forth in writing in,
25 among other places, the District Attorney's file on a form
26 entitled "EVALUATION", under a section entitled: "STATEMENT OF
27 FACTS, STRENGTHS, WEAKNESSES, FOLLOW-UP REQUESTED." On this
28 form, Deputy District Attorney Bernard Garber made the

1 following handwritten entry: "PX [preliminary hearing] waived -
2 D[efendant] to plead to Count 1 [auto theft] + 1 count of 470
3 [forgery] for local. See BG[Bernard Garber, Deputy District
4 Attorney] re details (D[efendant] is to testify in Peo v
5 Morales - 187 w/ specials, D[efendant] to remain in custody)
6 BG[Bernard Garber, Deputy District Attorney]." EVALUATION,
7 Exhibit "E" hereto. Although this entry is undated, it likely
8 was made on or before November 15, 1982, because, at the bottom
9 of the form, there is a stamp which reads: "Receipt of a copy
10 of this document is hereby acknowledged:" followed by the
11 handwritten entry: "to D[efendant]" and signed "BG[Bernard
12 Garber, Deputy District Attorney] 11/15";⁸

13 (m) Accordingly, contrary to Samuelson's sworn
14 testimony which went uncorrected by the District Attorney,
15 there was an agreement between the District Attorney and
16 Samuelson as early as November 15, 1982, which later was
17 verified in court on the record at a December 14, 1982
18 municipal court hearing on Samuelson's case (see Exhibit "F"
19 hereto), that four felony charges pending against Samuelson
20 would be dismissed in exchange for his testimony against
21 petitioner and that Samuelson's sentence would be one year and

22 ⁸ In view of the fact that there only are two entries on
23 this form, and the other entry is dated February 2, 1983, the
24 foregoing entry must have been made on or before November 15,
25 or else the District Attorney simply provided Samuelson with a
26 copy of a blank form; an unlikely and purposeless action. In
27 light of the fact that Samuelson was arrested on November 4,
28 1982 in Kingman, Arizona, and that the six felony counts filed
against him on November 12, 1982 either were resolved or
dismissed by April 11, 1983, the November 15 date must mean
November 15, 1982. The only other entry on the document, which
is dated February 2, 1983, would not yet have been made on
November 15, 1982, and presumably was not on the copy of the
form that was provided to Samuelson on November 15, 1982.

1 it would be served locally at the county jail;

2 (n) Respondent has admitted that such promises were
3 in fact made to Samuelson at page 57 of his Informal Opposition
4 filed on or about April 26, 1993 in the California Supreme
5 Court: "While there was an additional promise to drop charges
6 against Samuelson, Samuelson never testified that was the only
7 promise made to him." (Emphasis added.) Respondent seems to
8 be suggesting that because Samuelson did not deny that there
9 was more to the deal than he disclosed to the jury, this
10 constitutes acceptable sworn testimony. This suggestion by
11 respondent is unconscionable and, if such behavior is in fact
12 sanctioned by the Attorney General, this Court should clarify
13 the definition of "full disclosure", "honesty", and "integrity"
14 for respondent via the issuance of an order to show cause;

15 (o) After this deal was made between the District
16 Attorney and Samuelson, and after it was recorded in the
17 District Attorney's file in the Samuelson case and placed on
18 the record in court at the December 14, 1982 hearing, Samuelson
19 was appointed counsel to represent him on December 28, 1982.
20 Minute Order, December 28, 1982, Exhibit "G" hereto. In light
21 of the fact that Samuelson's counsel was not privy to the
22 communications and/or agreements entered into by Samuelson and
23 the District Attorney between November 10, 1982 and December
24 14, 1982, Samuelson's counsel, in the ordinary course of
25 representation, requested a preliminary hearing which then was
26 calendared and took place on February 2, 1983. This
27 preliminary hearing, which previously was waived by Samuelson
28 when he was representing himself, further facilitated the

1 execution of the agreement between the District Attorney and
2 Samuelson in that it caused further delay in Samuelson's
3 proceedings, thereby ensuring that he would remain incarcerated
4 until after he testified against petitioner on March 29, 1983;

5 (p) On February 8, 1983, a pre-trial conference took
6 place in Samuelson's case wherein a trial date was set for
7 April 11, 1983 at 9:45 a.m. Minute Order, February 8, 1983,
8 Exhibit "H" hereto. Recorded in the District Attorney's file
9 in the Samuelson case under the heading: "V. PRE-TRIAL
10 CONFERENCE: D.A. POSITION" was the following handwritten entry:
11 "10851 + 470 - local + rest[itution] on all - due to his
12 Testifying against Michael Morales." District Attorney's
13 Position Sheet, Exhibit "A" hereto. The District Attorney
14 further noted under the heading "COURT'S POSITION" that there
15 would be a "local" disposition of the matter. Id.;

16 (q) In this regard, Samuelson's testimony at
17 petitioner's trial that he would receive only a recommendation
18 from the District Attorney to serve his sentence in the county
19 jail also was false, and also went uncorrected by the District
20 Attorney. In fact, the District Attorney already had discussed
21 the matter with the San Joaquin County Superior Court and
22 already had obtained the court's confirmation that Samuelson's
23 sentence would be a local disposition. The District Attorney
24 recorded the court's position accordingly in his file. These
25 assurances never were disclosed to the petitioner, his counsel,
26 the Ventura County Superior Court where the case was tried, nor
27 the jury at trial. Moreover, these assurances undermine any
28 contention by respondent that Samuelson's testimony, i.e., that

1 he would receive "a recommendation" from the District Attorney,
2 was: (1) accurate; (2) a complete disclosure to the court and
3 jury of the favors he was to receive from the prosecution; or
4 (3) an accurate disclosure of the status of the negotiations
5 with either the prosecution or the San Joaquin County Superior
6 Court;

7 (r) Counsel further questioned Samuelson regarding
8 the reasons why Samuelson's case had been continued until after
9 his March 29, 1983 testimony against petitioner. Samuelson
10 again provided false testimony:

11 Q. In fact, your case has been put over until
12 sometime in April, right?

13 A. April 11th.

14 Q. To see how you do here, right?

15 A. For two reasons. One for the order to show
16 cause on the violation and one for a pre-trial
17 conference.

18 RT 2373 (emphasis added);

19 (s) This testimony was another bald faced lie, was
20 known to be such by the prosecutor, and went uncorrected by the
21 prosecutor; that is, the same prosecutor who also was
22 responsible for Samuelson's case. In fact, Samuelson's case
23 had not been continued until April 11, 1983 for a pre-trial
24 conference. Samuelson's pre-trial conference already had taken
25 place on February 8, 1983. Exhibit "H" hereto. At the
26 February 8, 1983 pre-trial conference, a trial date, not a pre-
27
28

1 trial conference, was set on April 11, 1983.⁹ Truthful
2 testimony would have required a simple "yes" response; not the
3 vague and false references to court appearances that in no way
4 could be understood by a jury which was not as experienced as
5 Samuelson with the criminal justice system;

6 (t) On March 29, 1983, Samuelson testified against
7 petitioner. On April 11, 1983, four days after the jury found
8 petitioner guilty of the charges against him, all felony
9 charges pending against Samuelson, except the section 10851
10 Vehicle Code violation and one section 470 Penal Code violation
11 were dismissed by Deputy District Attorney Bernard Garber,
12 ostensibly "in the interest of justice". Minute Order, April
13 11, 1983, Exhibit "I" hereto. Moreover, in response to the
14 order to show cause regarding the felony burglary probation
15 violation, Samuelson's probation was reinstated on May 26, 1983
16 after negotiations between the District Attorney and Samuelson
17 at the April 11, 1983 hearing. Minute Order, May 26, 1983,
18 Exhibit "J" hereto ("OSC viol[ation] was negotiated at change
19 of plea.");

20 (u) The dismissals of the other felony charges
21 against Samuelson were not based on the merits of the case
22 against him, or any hidden weaknesses in the case. Paul
23 Balestracci, the Deputy District Attorney who conducted the

24 ⁹ Counsel failed to use the February 8, 1983 minute
25 order (Exhibit "H" hereto) from Samuelson's case, which stated,
26 inter alia, that: (1) a pre-trial conference took place on
27 February 8, 1983; and (2) a trial date of April 11, 1983 was
28 set, to impeach this testimony. This fact is hereby
incorporated by reference into petitioner's claim no. 7 as
further evidence of counsel's lack of preparation and
ineffective assistance in response to the prosecution's use of
this snitch witness.

1 preliminary hearing on behalf of the People, recorded the
2 following in the District Attorney's file in the Samuelson case
3 after the preliminary hearing: "2-3-83. Arizona H.P. [Highway
4 Patrolman] is outstanding witness. The property was handled a
5 bit sloppily by SPD [Stockton Police Department], but no real
6 problems. Good case - D[efendant] confesses. Count 3 may be
7 weak because of ID [identification] of prop[erty]." PB [Paul
8 Balestracci, Deputy District Attorney]." EVALUATION, Exhibit
9 "E" hereto;

10 (v) The dismissal of the four felony charges and the
11 probation violation, and the one-year county jail sentence was
12 for one reason, and one reason only -- to complete the deal
13 that was negotiated between Deputy District Attorney Bernard
14 Garber and Samuelson at the time of his arrest and placement in
15 a cell adjacent to petitioner at the San Joaquin County Jail.
16 This deal was recorded in the District Attorney's file as early
17 as November, 1982, and put on the record and ratified by the
18 court as early as December 14, 1982;

19 (w) Neither counsel, petitioner, the Ventura County
20 Superior Court, nor the jury ever were informed of these
21 assurances provided to Samuelson in exchange for his testimony.
22 The prosecutor never attempted to correct the record, nor ever
23 advised the court or the jury of Samuelson's false testimony
24 regarding the assurances made to him by the prosecutor in
25 exchange for his testimony.

26 2. The foregoing failures, inter alia, by the
27 prosecution to disclose this evidence was material in that it
28 deprived petitioner of adequate impeachment information

1 regarding:

2 (a) Samuelson's expectation and receipt of leniency
3 from the prosecution in exchange for his testimony;

4 (b) The prosecution's negotiations with Samuelson
5 regarding the nature, timing and extent of the benefits
6 conferred upon him;

7 (c) Samuelson's continuing expectation of leniency,
8 which extended beyond the trial;

9 (d) Samuelson's false testimony that he did not
10 expect additional rewards for his testimony; and

11 (e) Material information crucial to the preparation
12 of petitioner's defense, and counsel's ability to discredit and
13 impeach the witness.

14
15 5. Knowing Use of False Testimony by Prosecution
16 (Samuelson)

17 A. Petitioner's Fifth, Sixth, Eighth, and Fourteenth
18 Amendment rights were violated by the prosecution's knowing use
19 of false testimony by the prosecution's star criminal informant
20 witness to petitioner's substantial prejudice. Upon receipt of
21 adequate funds reasonably necessary to fully investigate this
22 claim, and after having a full and fair opportunity to develop
23 this claim through investigation, discovery, expert analysis,
24 and evidentiary hearings, the following facts, among others,
25 will be presented to support this claim:

26 1. The prosecution knowingly used the false testimony of
27 Bruce Samuelson for the purposes of attempting to establish,
28 inter alia, petitioner's presence during the commission of the

1 murder, involvement and participation in the commission of the
2 murder, intent by petitioner to murder the victim, and that
3 petitioner raped the victim:

4 (a) Petitioner incorporates herein the allegations
5 in Section 4 above;

6 (b) Petitioner was arrested and incarcerated at the
7 San Joaquin County Jail on January 10, 1981. Almost two years
8 later, on November 3, 1982, Bruce Samuelson was arrested in
9 Kingman, Arizona (Exhibit "B" hereto), and was extradited to
10 Stockton, California to face six felony charges. Amended
11 Complaint, Exhibit "C" hereto;

12 (c) Samuelson arrived in Stockton and was
13 incarcerated at the San Joaquin County Jail on November 10,
14 1982. RT 2333; Stockton Police Department Subsequent Report,
15 December 17, 1982, Exhibit "D" hereto (["He] was returned to
16 Stockton from Kingman, Arizona on 11-10-82" Id. at 1).
17 On November 24 or 25, 1982, petitioner purportedly gave a
18 confession to Samuelson regarding various aspects of the
19 subject crime while they were incarcerated in adjacent cells at
20 the San Joaquin County Jail. Stockton Police Department
21 Subsequent Report, December 17, 1982, Exhibit "D" hereto
22 ("SAMUELSON advised that on either Thanksgiving night or the
23 night before Thanksgiving [i.e., November 24 or 25, 1982] that
24 MORALES had talked to him about the killing of Terri WINCHELL."
25 Id. at 2). By contrast, Samuelson testified at trial that this
26 confession began on November 15, 1982 and continued for two
27 weeks thereafter. RT 2340. Under either scenario, Samuelson
28 purportedly received the confession, or portions of the

1 confession, after November 15, 1982;

2 (d) Despite the fact that the purported confession
3 was not received until after November 15, 1982, Samuelson
4 obtained written assurances from the District Attorney on
5 November 15, 1982, i.e., prior to the date Samuelson
6 purportedly obtained a confession, for lenient treatment on the
7 six felony charges pending against him in exchange for his
8 testimony against petitioner;

9 (e) On a form entitled "EVALUATION", under a section
10 entitled: "STATEMENT OF FACTS, STRENGTHS, WEAKNESSES, FOLLOW-UP
11 REQUESTED", Deputy District Attorney Bernard Garber made the
12 following handwritten entry: "PX [preliminary hearing] waived -
13 D[efendant] to plead to Count 1 [auto theft] + 1 count of 470
14 [forgery] for local. See BG[Bernard Garber, Deputy District
15 Attorney] re details (D[efendant] is to testify in Peo v
16 Morales - 187 w/ specials, D[efendant] to remain in custody)
17 BG[Bernard Garber, Deputy District Attorney]." EVALUATION,
18 Exhibit "E" hereto. Although this entry is undated, it had to
19 have been made on or before November 15, 1982, because, at the
20 bottom of the form, there is a stamp which reads: "Receipt of a
21 copy of this document is hereby acknowledged:" followed by the
22 handwritten entry: "to D[efendant]" and signed "BG[Bernard
23 Garber, Deputy District Attorney] 11/15". In view of the fact
24 that there only are two entries on this form, and the other
25 entry is dated February 2, 1983, the foregoing entry must have
26 been made on or before November 15, or else the District
27 Attorney simply provided Samuelson with a copy of a blank form,
28 an unlikely and purposeless action. In light of the fact that

1 Samuelson was arrested on November 3, 1982 in Kingman, Arizona,
2 and the six felony counts filed against him on November 12,
3 1982 either were resolved or dismissed by April 11, 1983, the
4 November 15 date must mean November 15, 1982. Samuelson
5 appeared in court for a further arraignment on November 15,
6 1982, and likely received the document from the District
7 Attorney at this hearing. The date of this further arraignment
8 was noted on the jacket of the District Attorney's file in the
9 Samuelson case. File Jacket, Exhibit "K" hereto ("11/15 1:45
10 FA" Id.);

11 (f) Accordingly, the District Attorney gave
12 assurances to Samuelson for his testimony against petitioner on
13 November 15, 1982, i.e., before Samuelson even obtained the
14 purported incriminating statements from petitioner. This
15 conduct by the District Attorney is evidence that the District
16 Attorney knew that the story Samuelson ultimately was going to
17 tell at petitioner's trial in exchange for the lenient
18 treatment offered by the District Attorney wholly would be
19 fabricated;

20 (g) In view of the fact that the District Attorney
21 extended Samuelson prosecutorial favors in exchange for his
22 testimony against petitioner before Samuelson even obtained a
23 purported confession from petitioner, it is entirely probable
24 that the facts testified to by Samuelson were provided to him
25 by the District Attorney. Moreover, Samuelson's testimony
26 could have been a simple regurgitation of the account of the
27 crimes published in the local newspapers as follows:
28

SAMUELSON'S TESTIMONY

"Ricky Ortega had called
[petitioner] and--from the
restaurant" (RT 2335)

". . . another phone call,
this time from the Weberstown
Mall area" (RT 2336)

". . . took off in a car
northbound towards Lodi
. . . ." (RT 2336)

NEWSPAPER QUOTES

Ortega ". . . is employed as
a busboy at a Lincoln Village
restaurant." (Stockton
Record 1/11/81, Exhibit "L"
hereto)

Ortega ". . . worked as a
busboy at a Lincoln Center
restaurant" (Stockton Record
1/15/81, Exhibit "M" hereto)

". . . she had gone to meet
Ortega at the mall" (News-Sentinel 1/12/81,
Exhibit "N" hereto)

"However, the mother said,
just before her daughter left
she received a phone call
from Ortega and, police
believe, she planned on
taking a short amount of time
to help advise him on a gift
for the other girl; then buy
the seafood and return home."
(Stockton Record 1/11/81,
Exhibit "L" hereto)

"The mother told
investigators she had been
ill Thursday and her daughter
volunteered to bring her some
seafood from a Pacific
Avenue restaurant." (Stockton
Record 1/11/81, Exhibit "L"
hereto)

"They headed toward Lodi
. . . ." (Stockton Record
1/11/81, Exhibit "L" hereto)

". . . found Saturday in a
vineyard north of Lodi . . .
." (Stockton Record 1/11/81,
Exhibit "L" hereto)

". . . found Saturday stabbed
to death in a vineyard north
of Lodi." (News-Sentinel
1/12/81, Exhibit "N" hereto)

1	"As they were driving	"Officers said [petitioner]
2	[petitioner] attempted to	used his belt in an attempt
3	strangle her with this belt."	to strangle her"
4	(RT 2337)	(Stockton Record 1/11/81,
5		Exhibit "L" hereto)
6	"The belt broke." (RT 2337)	
7		". . . strangle her, but the
8		belt broke." (Stockton
9		Record 1/11/81, Exhibit "L"
10		hereto)
11	"She fell forward unconscious	
12" (RT 2337)	". . . beating her
13		unconscious. (Stockton Record
14		1/11/81, Exhibit "L" hereto)
15		
16	" . . . started beating her	"Then he hit her several
17	over the head in the rear of	times in the head with a
18	her head with a hammer." (RT	hammer" (Stockton
19	2337)	Record 1/11/81, Exhibit "L"
20		hereto)
21		
22	" . . . severe blows to the	"They headed toward Lodi,
23	back of the head." (RT 2338)	Ortega driving, the girl
24		alongside him on the front
25		seat, and [petitioner] in the
26		back, sitting behind her."
27		(Stockton Record 1/11/81,
28		Exhibit "N" hereto)
	" . . . he told his cousin to	"[petitioner] ordered Ortega
	pull the car over and stop."	to stop the car"
	(RT 2338)	(Stockton Record 1/11/81,
		Exhibit "L" hereto)
	"He took the body out,	" . . . stop the car and then
	dragged it face down across	pulled the victim from the
	the pavement" (RT	car and into the vineyard . .
	2338)	. ." (Stockton Record
		1/11/81, Exhibit "L", hereto)
	" . . . he proceeded to rape	" . . . were arraigned . . .
	her." (RT 2338)	on murder, robbery and rape
		charges." (Stockton Record
		1/13/81, Exhibit "O" hereto)
		" . . . have determined that
		she was raped and robbed."
		(Stockton Record 1/14/81,
		Exhibit "P" hereto)

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"[petitioner] stabbed her
about four times"
(RT 2338)

". . . [petitioner] went in
to hide the belt and to wash
off the tools, the hammer and
the knife." (RT 2339)

". . . [petitioner] had
placed the weapons--one of
the weapons in the
refrigerator . . . believe it
was the knife." (RT 2340)

"Ortega . . . and . . .
[petitioner] . . . are
charged with . . . rape . .
. . ." (News-Sentinel 1/17/81,
Exhibit "Q" hereto)

". . . used a hunting knife
to stab her several times . .
. . ." (Stockton Record
1/11/81, Exhibit "L" hereto)

". . . stabbed her repeatedly
in the chest" (News-
Sentinel 1/12/81, Exhibit "N"
hereto)

The autopsy report provides
an in-depth description of
the four knife wounds.
Samuelson alluded in his
testimony to having seen or
read reports about the
autopsy and/or prepared by
the criminalist. (RT 2357)

"A 16-year-old girl . . . was
taken into custody after
police learned she had helped
[petitioner] wash blood from
the attack weapons"
(Stockton Record 1/11/81,
Exhibit "L" hereto)

"A 16-year-old Modesto girl
was also arrested . . . after
allegedly helping
[petitioner] clean blood off
the murder weapons"
(News-Sentinel 1/12/81,
Exhibit "N" hereto)

"After more searching,
officers found a hammer
hidden in the vegetable
crisper of a refrigerator."
(Stockton Record 1/11/81,
Exhibit "L" hereto)

After more searching, the
police found a hammer hidden
in the vegetable crisper of
the refrigerator." (News-
Sentinel 1/12/81, Exhibit "N"
hereto)

1 (h) James Kevin Mahoney, a prisoner incarcerated in
2 a cell next to petitioner and across the hall from Samuelson,
3 would testify as follows:

4 1. I was arrested for murder on August 29, 1982.
5 Beginning on August 29, 1982, I was incarcerated in the San
6 Joaquin County Jail. Initially, I was housed in an area of the
7 jail referred to as the "hole" and, subsequently, I was moved
8 to the second tier in the jail. The preliminary hearing for my
9 case began in late November, 1982, and ended in early December,
10 1982. Prior to my preliminary hearing, I was moved back to the
11 "hole" at the jail. This occurred in approximately the second
12 week of November, 1982. At about that time, I was advised by
13 my attorney that two jailhouse informants were going to testify
14 against me at my preliminary hearing. Accordingly, at that
15 time, I was very suspicious when anyone asked me about the
16 facts in my case.

17 2. When I moved back to the "hole", I was housed in
18 cell 9, and Michael Morales was housed next door to me in cell
19 10. The area of the jail where we were kept was a six cell
20 block, with three cells on one side of the hall, and three
21 cells on the opposite side of the hall. A true and correct
22 drawing of the configuration of this cell block is attached
23 hereto. Bruce Samuelson was housed in a cell directly across
24 the hall from the cells where Morales and I were housed, which
25 I believe was either cell number 12 or cell number 14. A true
26 and correct xeroxed copy of a photograph of Bruce Samuelson is
27 attached hereto.

28 3. I remained housed in cell 9 in the "hole" until

1 a few days after November 23, 1982. I remember this date
2 because it was the date I attempted to commit suicide. After
3 my suicide attempt, I was taken to the hospital for a few
4 hours, then returned to my cell in the "hole" for a few days.
5 I then was transferred to the medical cell area. Attached
6 hereto is a copy of my hospital record identifying the date and
7 time of the medical treatment received for my suicide attempt
8 as November 23, 1982 at 2:26 a.m.

9 4. While incarcerated in the "hole" in November,
10 1982, all inmates housed in our cell block were required to eat
11 their meals in their cells, and only were allowed out of their
12 cells for court dates, attorney visits, showers, and minimal
13 time in the yard. All inmates housed in the hole accompanied
14 each other to the yard and to the showers.

15 5. Inmates housed in the hole could not move freely
16 between the cells in the jail; but instead, were locked down in
17 their individual cells at all times. Accordingly, any
18 conversations between the inmates in our cell block area had to
19 occur with one inmate talking to another from one cell to
20 another. As a result, everyone housed in our six cell block
21 area could easily hear any conversations taking place between
22 the inmates in our cell block area.

23 6. Bruce Samuelson often initiated conversations
24 with Mike Morales and with me. Because Samuelson was across
25 the hall from both of us, these conversations easily could be
26 heard by either of us, as well as the other inmates in our cell
27 block area.

28 7. During my incarceration in the "hole" in

1 November, 1982, Samuelson repeatedly asked Morales and me about
2 the particular facts of our cases. Samuelson always initiated
3 these conversations. I was particularly suspicious and
4 concerned about his questions, and I specifically paid
5 attention to his actions because of my attorney's advices that
6 the District Attorney was intending to use jailhouse informants
7 against me at my preliminary hearing.

8 8. Morales generally told Samuelson that he did not
9 want to talk about his case; however, on a few occasions,
10 Morales did ask Samuelson some questions regarding the meanings
11 of certain medical or legal terms. Morales' questions always
12 were in response to Samuelson's questioning. Morales never
13 discussed with, nor directed questions to, Samuelson or anyone
14 else regarding the facts surrounding the allegations against
15 him.

16 9. From the nature of Samuelson's repeated
17 questions to Morales, it was clear that Samuelson was familiar
18 with the circumstances surrounding the death of the victim in
19 Morales' case, as well as the charges and allegations against
20 Morales.

21 10. Specifically, Samuelson's questions evidenced
22 the fact that Samuelson knew, among other things, that: (1) the
23 victim allegedly had been struck with a hammer numerous times;
24 (2) someone allegedly had attempted to strangle the victim; (3)
25 the victim was found in a vineyard near Lodi; and (4) the
26 victim may have been sexually assaulted. I specifically recall
27 Samuelson repeatedly asking Morales what the victim did to
28 deserve being struck with a hammer so many times, and whether

1 the victim was struck with a hammer by Morales or the co-
2 defendant in his case, Ricky Ortega. In each instance that
3 Samuelson questioned Morales regarding the foregoing, Morales
4 replied that he did not want to discuss the matter.

5 11. Samuelson also asked Morales several times
6 whether the victim was alive when she was sexually assaulted,
7 and whether the victim was sexually assaulted by Morales or the
8 co-defendant in his case, Ricky Ortega. It was clear from the
9 nature of Samuelson's questions that he knew that the victim
10 was alleged to have been raped. In response to this repeated
11 questioning, I specifically remember that Morales became angry,
12 refused to discuss the topic, and instructed Samuelson, with no
13 uncertainty, to stop asking him questions about his case.

14 See Declaration of James Kevin Mahoney, Exhibit "R" hereto.

15 2. The prosecution's knowing use of false testimony by a
16 criminal informant was material in that it falsely linked
17 petitioner to inflammatory criminal activities for which there
18 was no substantiating evidence to any certainty, much less to a
19 certainty beyond a reasonable doubt, including but not limited
20 to:

21 (a) That petitioner was with Ortega at the time of
22 the victim's death;

23 (b) That petitioner participated in the murder;

24 (c) That petitioner intended, with premeditation and
25 deliberation, to murder the victim;

26 (d) That a sexual act was committed upon the victim
27 while she was alive; and

28 / /

1 (e) That petitioner raped the victim.

2 3. Without the use of Samuelson's false testimony, none
3 of these facts could have been proved by the prosecution at
4 all, much less beyond a reasonable doubt. The prosecution's
5 use of Samuelson's false testimony relieved it of its burden of
6 proof regarding, inter alia, the foregoing facts in violation
7 of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment
8 rights.

9
10 6. Improper Use of Government Agent

11 A. Petitioner's Fifth, Sixth, Eighth, and Fourteenth
12 Amendment rights were violated by the prosecution's use of the
13 star criminal informant witness as a government agent to elicit
14 a confession from petitioner after his arrest to the prejudice
15 of petitioner. Upon receipt of adequate funds reasonably
16 necessary to fully investigate this claim, and after having a
17 full and fair opportunity to develop this claim through
18 investigation, discovery, expert analysis, and evidentiary
19 hearings, the following facts, among others, will be presented
20 to support this claim:

21 1. The prosecutor planted Samuelson, an inmate charged
22 with theft, forgery, and receiving stolen property, in a cell
23 in the "hole" area of the San Joaquin County Jail; an area used
24 solely to house persons charged with extremely violent crimes
25 or disciplinary problems in the county jail. Samuelson, a
26 former trustee at the jail, was neither a disciplinary problem
27 nor a person charged with a violent crime. Nevertheless, he
28 was placed in a cell immediately adjacent to petitioner, and

1 another inmate charged with capital murder, for the purpose of
2 soliciting a confession from petitioner:

3 (a) Petitioner incorporates herein the allegations
4 in Sections 4 and 5 above;

5 (b) The November 15, 1982 provision of prosecutorial
6 favors to Samuelson, i.e., prior to the date that Samuelson
7 obtained a purported confession from petitioner, evidences the
8 fact that the prosecutor was using Samuelson as an agent at all
9 times after November 15, 1982, and likely before November 15,
10 1982, to attempt to obtain a confession from petitioner;¹⁰

11 (c) This further is supported by the letter that
12 Samuelson passed to Garber listing his demands for favors in
13 exchange for his testimony against petitioner which concludes
14 with the following sentence: "What I have to tell you in
15 regards to Morales will be quite a bit more than you expected."
16 Exhibit "S" hereto (emphasis added). This undated note
17 confirms that: (1) Garber had been in contact with Samuelson
18 prior to Samuelson's purported receipt of a confession, and
19 that Garber was using Samuelson as an agent to attempt to
20 obtain information from petitioner - evidenced by the fact that
21 Samuelson states that Garber was "expecting" something from
22 Samuelson; and (2) although previously contacted by Garber,
23 Samuelson had yet to advise Garber of his findings or of his

24 ¹⁰ The December 17, 1982 Stockton Police Department
25 Subsequent Report (Exhibit "D" hereto) states that Samuelson
26 contacted Deputy District Attorney Bernard Garber on December
27 6, 1982 and advised him that he had information on the subject
28 case. This is incorrect or, at the very least, misleading. As
shown above, Garber gave written assurances to Samuelson on
November 15, 1982 that he would dismiss four felony charges
against Samuelson in exchange for his testimony against
petitioner.

1 "proposed" testimony - evidenced by Samuelson's comment that he
2 "ha[s] to" and "will be" telling Garber something;

3 (d) Moreover, James Kevin Mahoney, who was
4 incarcerated in a cell next to petitioner during this time,
5 would testify as follows:

6 1. Bruce Samuelson often initiated conversations
7 with Mike Morales and with me. Because Samuelson was across
8 the hall from both of us, these conversations easily could be
9 heard by either of us, as well as the other inmates in our cell
10 block area.

11 2. During my incarceration in the "hole" in
12 November, 1982, Samuelson repeatedly asked Morales and me about
13 the particular facts of our cases. Samuelson always initiated
14 these conversations. I was particularly suspicious and
15 concerned about his questions, and I specifically paid
16 attention to his actions because of my attorney's advices that
17 the District Attorney was intending to use jailhouse informants
18 against me at my preliminary hearing.

19 3. Morales generally told Samuelson that he did not
20 want to talk about his case; however, on a few occasions,
21 Morales did ask Samuelson some questions regarding the meanings
22 of certain medical or legal terms. Morales' questions always
23 were in response to Samuelson's questioning. Morales never
24 discussed with, nor directed questions to, Samuelson or anyone
25 else regarding the facts surrounding the allegations against
26 him.

27 See Declaration of James Kevin Mahoney, Exhibit "R" hereto.
28

1 2. The prosecution's use of Samuelson to initiate
2 discussions with petitioner, attempt to solicit a confession
3 from petitioner, and/or to receive statements from petitioner
4 while acting as a government agent, deprived petitioner of his
5 Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

6
7 7. Ineffective Assistance of Counsel Regarding
8 Informant Testimony

9 A. Petitioner's counsel rendered ineffective assistance
10 of counsel in violation of petitioner's Fifth, Sixth, Eighth,
11 and Fourteenth Amendment rights when he unreasonably failed to
12 adequately investigate and present facts to impeach the false
13 testimony of the prosecution's star criminal informant witness,
14 and failed to request an instruction that the testimony of a
15 criminal informant should be viewed with distrust, to
16 petitioner's substantial prejudice. Upon receipt of adequate
17 funds reasonably necessary to fully investigate this claim, and
18 after having a full and fair opportunity to develop this claim
19 through investigation, discovery, expert analysis, and
20 evidentiary hearings, the following facts, among others, will
21 be presented to support this claim:

22 1. Counsel failed to provide reasonably adequate
23 representation by failing to investigate and present available
24 impeachment evidence, and request the necessary instruction to
25 the jury, with respect to the false testimony of Bruce
26 Samuelson as set forth below:

27 (a) Petitioner incorporates herein the allegations
28 in Sections 4 through 6 above;

1 evidence of eyewitnesses, prosecutorial evidence, police
2 reports, and court-filed documents which also could have been
3 used to impeach Samuelson;

4 (c) If the proper impeachment evidence had been
5 tendered, and the proper instruction had been given to the
6 jury, it is reasonably probable that a verdict of: (1) not true
7 on the lying-in-wait special circumstance; (2) not true on the
8 torture special circumstance; (3) not true with respect to the
9 special finding of premeditation and deliberation; (4) a lesser
10 degree of homicide and/or conspiracy to commit homicide; or (5)
11 not guilty verdicts, would have been returned by the jury; and

12 (d) Alternatively, if this impeachment evidence was
13 known and properly utilized by counsel, it is reasonably
14 probable that pre-trial negotiations would have culminated in
15 an offer of a sentence less than death in exchange for a guilty
16 plea to certain charges; an offer that petitioner would have
17 accepted.

18
19 8. Ineffective Assistance of Counsel at Guilt Phase
20 Regarding PCP Use

21 A. Petitioner's counsel rendered ineffective assistance
22 of counsel at the guilt phase of trial in violation of
23 petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment
24 rights when he unreasonably failed to adequately investigate
25 and present facts supporting a legal defense to the crimes to
26 petitioner's substantial prejudice. Upon receipt of adequate
27 funds reasonably necessary to fully investigate this claim, and
28 after having a full and fair opportunity to develop this claim

1 through investigation, discovery, expert analysis, and
2 evidentiary hearings, the following facts, among others, will
3 be presented to support this claim:

4 1. Counsel failed to provide reasonably adequate
5 representation by failing to investigate petitioner's prolonged
6 use of phencyclidine ("PCP") during and prior to the offense,
7 which would have provided a defense to the mental element of
8 the murder, conspiracy to commit murder, and rape charges, as
9 well as the special circumstance allegations:

10 (a) PCP is a dissociative anaesthetic that produces
11 a mental state in which the recipient is oblivious to what is
12 happening to his or her body (e.g., rendering the person
13 impervious to pain and capable of extraordinary feats of
14 strength) and can cause a similar dissociative, unconscious
15 mental state that produces random, detached, inappropriate and
16 violent acts. Such reactions to PCP intoxication are not dose-
17 related and are variable through time. That means the drug can
18 produce widely varying, unpredictable reactions in the same
19 individual on different occasions. One constant, however, is
20 that negative reactions to PCP exacerbate a person's pre-
21 existing psychotic condition. Consequently, PCP intoxication
22 is capable of producing a psychotic mental state and grossly
23 abnormal conduct in anyone; and it can actually trigger
24 psychosis in those vulnerable to psychosis and greatly
25 aggravate the symptoms and effects of an established psychosis;

26 (b) PCP is stored in the body fat for many years
27 after the initial period of intoxication, and may be released
28 in clinically toxic amounts weeks, months, or even years later,

1 depending upon the amount and frequency of original use.
2 Factors such as dramatic weight loss are known to trigger a
3 secondary release of PCP from fat stores;

4 (c) PCP is a powerful drug which is frequently used
5 because it produces an initial elation or "head rush" and then
6 a numbness, during which the user remembers nothing. In
7 addition to psychosis, which can be one of its after-effects,
8 PCP users frequently suffer true pharmacological amnesia as to
9 their behavior while in that drug-altered state;

10 (d) Despite being advised by his investigator on the
11 days following petitioner's arrest that petitioner had smoked
12 half a joint of "kj" (i.e., PCP) on the evening of the subject
13 crimes, counsel unreasonably failed to have forensic tests
14 conducted on petitioner's blood, urine, tissues, and/or hair
15 samples which would have scientifically confirmed his PCP use.
16 Counsel's investigator, Luana Horstkotte, would have testified
17 that:

18 1. From approximately October 1, 1980 through
19 November, 1983, I was employed as an investigator for a law
20 firm in Stockton, California which originally was called
21 Talley, Holloway, Tauman & Holmes and, subsequently, called
22 Holloway, Tauman, Holmes & Fialkowski. In this regard, I
23 performed work at various times on the case People v. Michael
24 Angelo Morales.

25 2. Attached hereto is a document which we referred
26 to in the office as a "Face Sheet". These forms were filled
27 out in the ordinary course of business at our office when a
28 criminal file was assigned to the firm. The information

1 provided on the Face Sheet would be obtained from the client
2 during an interview taking place shortly after the arrest.

3 3. With respect to the Face Sheet, I filled out the
4 information on this form as it was provided to me by Michael
5 Morales. This Face Sheet was filled out by me during an
6 interview which took place on January 15, 1981. It was my
7 custom and practice to deliver the completed Face Sheet to the
8 attorney assigned to the case for his or her review immediately
9 upon its completion. The Face Sheet then would be placed in
10 the file. Generally, a completed Face Sheet would be given to
11 the attorney handling the case on the day that it was filled
12 out. Based upon my custom, practice, and habit in this regard,
13 the Face Sheet would have been given to Craig Holmes, the
14 attorney handling this case, on either January 15, 1981 or on
15 the following day.

16 4. With respect to the information provided to me
17 by Michael Morales which is recorded on this Face Sheet, I have
18 no reason to believe that his answers were not complete and
19 honest.

20 5. On page two of the Face Sheet is a heading
21 "Drinking and/or Drugs". I filled in the following information
22 under that heading: "wine & beer - unk. amt. (a lot) 1/2 jt.
23 kj". The meaning of this notation is that on January 15, 1981,
24 Michael Morales advised me that on the date of the offenses for
25 which he was charged, he had consumed wine and beer in an
26 unknown amount; however, he had consumed a significant amount.
27 In addition, he reported consuming a half joint of kj. My
28 understanding of his use of the term "kj" was that he had

1 consumed a joint or cigarette which had been laced with
2 phencyclidine, i.e., "PCP".

3 See Declaration of Luana Horstkotte, Exhibit "T" hereto;

4 (e) Counsel knew that petitioner was charged with
5 forcible rape and premeditated murder caused by a brutally
6 violent physical attack. Counsel also knew that prior to this
7 event, petitioner never had been:

8 (i) arrested, charged, or convicted of any crime
9 related to sexual assault or molestation; and

10 (ii) convicted of a crime whereby he violently
11 assaulted or battered another person, or used a
12 weapon to assault or batter another person.

13 Accordingly, the obvious question which counsel
14 should have investigated was whether this alleged behavior,
15 which wholly was inconsistent with petitioner's past behavior
16 and record, was caused by the ingestion of PCP or other drugs;

17 (f) Counsel unreasonably failed to interview
18 petitioner, counsel's investigator, petitioner's relatives, or
19 petitioner's friends about petitioner's regular PCP use at the
20 time of the subject crimes, and on the days and months
21 preceding these crimes, as well as a number of potential
22 witnesses whose identities were known to him or could easily
23 have been ascertained, who would have told counsel that they
24 saw petitioner using PCP on or about the night of the offense,
25 and/or during the week of the offense, and/or regularly during
26 the several months prior to the offense, and that petitioner
27 had habitually been using PCP three or four times per week in
28 the months prior to the offense. Specifically, Julio Marquez

1 would have testified that:

2 1. I have known Michael Angelo Morales since
3 approximately 1978, when I was 16 years old. I always have
4 considered Mike a personal friend of mine;

5 2. During the years prior to Mike's arrest, I
6 frequently socialized with him. During the months prior to his
7 arrest, I would see Mike at parties and at various friends'
8 houses as often as once per week;

9 3. I last saw Mike the week that he was arrested.
10 I am informed and thereon believe that Mike was arrested on
11 January 10, 1981. During the days prior to January 10, 1981, I
12 personally observed Mike smoking "kj" on at least two
13 occasions. "Kj" is PCP powder sprinkled on parsley which is
14 rolled into a joint or cigarette;

15 4. I remember seeing Mike smoking "kj" outside
16 Herman "Popsie" Marquez' apartment on Popular Street in
17 Stockton at a New Year's party on the days preceding his
18 arrest. Because it was a New Year's party, the date must have
19 been January 1, 1981;

20 5. After that occasion, during January 2 and
21 January 3, 1981, I was with Mike at the duplex where I lived on
22 Center Street in Stockton. At that time, I personally observed
23 Mike smoking "kj". I specifically remember this party because
24 my girlfriend had cooked menudo, and Mike, some of our other
25 friends, and myself shared it at that time. Menudo is a
26 popular Mexican recipe which my girlfriend only cooked for me
27 on that one occasion;

28 / /

1 6. During the months preceding Mike's arrest, Mike
2 smoked "kj" numerous times in my presence. Mike smoked "kj" in
3 my presence whenever it was available, including as often as
4 several times per week during the months preceding his arrest.
5 Mike also regularly drank alcohol in my presence, including
6 Thunderbird wine and Budweiser beer. During the year prior to
7 Mike's arrest, I also observed him consume "acid" or LSD, and
8 frequently saw him smoke "Shermans". I am informed, and
9 thereon believe, that a "Sherman" is a cigarette which is
10 dipped in embalming fluid;

11 7. During the months preceding Mike's arrest, I
12 personally observed him frequently socializing with Manuel
13 Vasquez.

14 See Declaration of Julio Marquez, Exhibit "U" hereto.

15 Moreover, Manuel Franco Vasquez would have testified
16 that:

17 1. My date of birth is May 29, 1959. I have known
18 Michael Angelo Morales since approximately 1977 or 1978 when I
19 was about 18 years old. I have considered Mike a close
20 personal friend of mine since that time;

21 2. From approximately 1979 until the date of Mike's
22 arrest, I frequently socialized with him. At various times
23 during the months prior to Mike's arrest, he lived with me at
24 my mother's apartment in Stockton. This apartment was in the
25 JOJ apartments behind Oak Park. I frequently socialized with
26 Mike during that time, and I was with Mike at parties and at
27 various friends' houses as often as three or four times per
28 week;

1 3. I last saw Mike around Christmas of 1980. I
2 specifically remember the occasion because Mike was with me
3 when I was arrested for an alleged armed robbery of a Jack-in-
4 the-Box restaurant in Stockton. I specifically remember being
5 arrested for this incident because I was innocent of these
6 charges, and I should not have been arrested. These charges
7 against me ultimately were dropped by the District Attorney.
8 As a result of that arrest, I remained in the San Joaquin
9 County Jail from the date of my arrest around Christmas of
10 1980, until after Mike's arrest in early January, 1981;

11 4. In the days prior to Christmas, 1980, I
12 personally observed Mike smoking "kj" on several occasions.
13 "Kj" is PCP powder sprinkled on marijuana, tobacco, or parsley,
14 which then is rolled into a joint or cigarette;

15 5. On the night of my arrest, I personally observed
16 Mike smoking a "Sherman". A "Sherman" is a cigarette or a
17 marijuana joint which is dipped into chemicals, which I believe
18 include embalming fluid and ether. "Shermans" filled with
19 marijuana were referred to as "Lovelies", and "Shermans" filled
20 with cigarette tobacco were referred to as "Super Cools". I
21 specifically remember Mike smoking a "Sherman" on the night of
22 my arrest around Christmas, 1980, because I was with Mike when
23 he obtained the "Sherman", and after Mike consumed the
24 cigarette, he was passed out in my car when the police pulled
25 me over and arrested me;

26 6. Approximately three weeks prior to my arrest, I
27 was with Mike when he obtained approximately five "kj" joints
28 at the residence of a person whose name, based upon my best

1 recollection, is "Robert" or "Mike" Vasquez. Mike consumed
2 these "kj" joints in my presence, and also shared other "kj"
3 joints with other people during the three weeks prior to my
4 arrest. I specifically remember Mike acquiring these "kj"
5 joints because they were obtained, along with handfuls of
6 "Christmas Trees", which are pills that also are referred to as
7 "speed", as repayment for certain debts or favors owed by
8 "Robert" or "Mike" Vasquez to several of my friends;

9 7. On the two evenings prior to my arrest, I was in
10 Mike's presence and personally observed him smoking "kj". Mike
11 smoked "kj" in my presence whenever it was available, including
12 as often as several times per week between the time we became
13 close friends in 1979 until the date of my arrest in December,
14 1980. Mike also regularly became intoxicated in my presence
15 after drinking Thunderbird wine and Budweiser beer. I also saw
16 Mike consume "Christmas Trees" or "speed", "acid" or "LSD", and
17 I frequently saw him smoke "Shermans". Mike regularly used
18 various types of illegal drugs that were available on the
19 street, and I personally observed him do this three or four
20 times per week during 1980.

21 See Declaration of Manuel Vasquez, Exhibit "V" hereto;

22 (g) Counsel allowed petitioner's blood sample drawn
23 by the Stockton Police Department on January 10, 1981 to become
24 decomposed, thereby precluding scientific confirmation of
25 petitioner's PCP use from that blood sample, by unreasonably
26 delaying forensic testing of the blood sample for over two
27 years, after being advised one year earlier by the District
28 Attorney that it likely would decompose if he did not act

1 promptly;

2 (h) Counsel failed to consult or retain a drug or
3 mental health expert at or near the time of petitioner's
4 arrest, or within two years following petitioner's arrest, to
5 evaluate the effects of petitioner's PCP use, including: (1)
6 whether immediate blood, urine, tissue, or hair testing should
7 have been conducted; (2) the possible behavioral or mental
8 effects of such drug use; and/or (3) whether any other issues
9 regarding PCP ingestion immediately should have been
10 investigated to preserve or develop any possible defenses or
11 mitigating factors;

12 (i) Despite being advised by a forensic toxicologist
13 and a clinical psychologist two years after petitioner's arrest
14 that counsel should investigate the possible effects of
15 petitioner's chronic PCP use in relation to the alleged
16 offense, counsel made no such investigation. Such
17 investigation would have provided petitioner with a complete
18 legal defense to the crimes; and

19 (j) Counsel's actions and inactions, described
20 above, were not and could not have been as a result of any
21 sound strategic decisions.

22 2. Petitioner substantially was prejudiced by the above-
23 described failures of counsel in the following respects, among
24 others to be presented after full investigation and discovery:

25 (a) Had counsel investigated the facts of
26 petitioner's chronic PCP use, he would have located an
27 extensive array of documentary evidence, lay and expert
28 testimony, and scientific evidence creating a very strong

1 defense to the charges against petitioner, to the effect that
2 petitioner's long term and acute PCP intoxication precluded him
3 from forming the mental intent required to be proven by the
4 prosecution;

5 (b) Instead of investigating and presenting the
6 strong defense described above, counsel unreasonably presented
7 no affirmative defenses;

8 (c) If the proper defense had been tendered, it is
9 reasonably probable that a verdict of: (1) not true on the
10 lying-in-wait special circumstance; (2) not true on the torture
11 special circumstance; (3) not true with respect to the special
12 finding of premeditation and deliberation; (4) a lesser degree
13 of homicide and/or conspiracy to commit homicide; or (5) not
14 guilty verdicts, would have been returned by the jury; and

15 (d) Alternatively, if the facts regarding
16 petitioner's PCP use were known and properly utilized by
17 counsel, it is reasonably probable that pre-trial negotiations
18 would have culminated in an offer of a sentence less than death
19 in exchange for a guilty plea to certain charges; an offer that
20 petitioner would have accepted.

21
22 9. Ineffective Assistance of Counsel at Penalty Phase
23 Regarding PCP Use

24 A. Petitioner's counsel rendered ineffective assistance
25 of counsel at the penalty phase in violation of petitioner's
26 Fifth, Sixth, Eighth, and Fourteenth Amendment rights when he
27 unreasonably failed to adequately investigate and present facts
28 supporting mitigation for the crimes of which he was convicted.

1 Upon receipt of adequate funds reasonably necessary to fully
2 investigate this claim, and after having a full and fair
3 opportunity to develop this claim through investigation,
4 discovery, expert analysis, and evidentiary hearings, the
5 following facts, among others, will be presented to support
6 this claim:

7 1. Counsel failed to provide reasonably adequate penalty
8 representation by failing to investigate and present available
9 evidence in mitigation as set forth below:

10 (a) Petitioner incorporates herein the allegations
11 in Section 8 above. The failure to investigate or produce
12 evidence of petitioner's chronic PCP use and PCP ingestion on
13 or about the night of the crimes deprived him of substantial
14 mitigation under California law. Cal. Penal Code § 190.3
15 (h) (West 1988).

16
17 10. Ineffective Assistance of Counsel at Guilt Phase
18 Regarding Alcohol Intoxication

19 A. Petitioner's counsel rendered ineffective assistance
20 of counsel at the guilt phase of trial in violation of
21 petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment
22 rights when he unreasonably failed to adequately investigate
23 and present facts supporting a legal defense to the crimes to
24 petitioner's substantial prejudice. Upon receipt of adequate
25 funds reasonably necessary to fully investigate this claim, and
26 after having a full and fair opportunity to develop this claim
27 through investigation, discovery, expert analysis, and
28 evidentiary hearings, the following facts, among others, will

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1 4. For such other and further relief as the Court
2 may deem just and proper.

3
4 DATED: January 14, 1994

CONDON & FORSYTH

5
6 By: 

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Attorneys for Petitioner
MICHAEL ANGELO MORALES

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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 MICHAEL ANGELO MORALES,

15
16 Petitioner,

17 v.

18 ARTHUR CALDERON, Warden, California
State Prison at San Quentin,

19 Respondent.
20

CAPITAL CASE

No. CV 91-0682-DT

OPPOSITION TO MOTION FOR
EVIDENTIARY HEARING AND
CROSS-MOTION FOR JUDGMENT
ON THE PLEADINGS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Hearing: June 29, 1998
Time: 10:00 A.M.
Before the Honorable
Dickran Tevrizian

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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 MICHAEL ANGELO MORALES,

Petitioner,

17 v.

18 ARTHUR CALDERON, Warden, California
State Prison at San Quentin,

19 Respondent.

CAPITAL CASE

No. CV 91-0682-DT

OPPOSITION TO MOTION FOR
EVIDENTIARY HEARING AND
CROSS-MOTION FOR JUDGMENT
ON THE PLEADINGS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Hearing: June 29, 1998
Time: 10:00 A.M.
Before the Honorable
Dickran Tevrizian

23 RESPONDENT Arthur Calderon, Warden of California State
24 Prison at San Quentin (hereinafter "warden"), by and through his
25 attorneys of record herein, hereby oppose petitioner's motion for
26 an evidentiary hearing. This opposition is based on this notice,
27 the attached memorandum of points and authorities in support

1 thereof, and such further evidence and argument that may be
2 presented at the hearing of this motion. The warden further
3 gives notice to petitioner and his attorneys of record that he
4 hereby moves this court in conjunction with this opposition for
5 an order granting the warden a judgment on the pleadings as to
6 all 38 claims raised in petitioner's evidentiary hearing motion.
7 This motion is based on this notice, the attached memorandum of
8 points and authorities in support thereof, and such further
9 evidence and argument that may be presented at the hearing of
10 this motion.

11 Dated: April 28, 1998.

12 Respectfully submitted,

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27 LA91XW0002

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION
2 TO MOTION FOR EVIDENTIARY HEARING AND CROSS-MOTION FOR
3 JUDGMENT ON THE PLEADINGS ON 38 CLAIMS

4 INTRODUCTION

5
6 Petitioner has filed a motion that asks this court for a
7 hearing on 38 of the 59 claims contained in the first amended
8 petition for writ of habeas corpus. In support of the
9 evidentiary hearing motion, petitioner argues that good cause
10 exists for the hearing based on the factual bases pleaded in the
11 amended petition, the exhibits attached to that petition, and the
12 exhibits attached to the evidentiary hearing motion. The motion
13 does not include under Central District Local Rule 26.8.8(f) a
14 specification of "the factual issues" to be addressed at the
15 proposed hearing of any of the 38 claims. Instead, the motion
16 relies upon "the facts in the first amended petition wherein
17 evidence can and will be presented." (Evid. Hrg. Mem at 6:3-4.)

18 The warden opposes this motion and further moves this
19 court based on the same arguments advanced in support of his
20 opposition to the evidentiary hearing motion to grant the warden
21 a judgment on the pleadings as to all 38 claims at issue in the
22 evidentiary hearing motion.

23
24 APPLICABLE LAW

25
26 "In habeas proceedings, an evidentiary hearing is required
27 when petitioner's allegations, if proven, would establish the

1 impermissible new rule of law in violation of Teague v. Lane, 489
2 U.S. 288 (1989).

3
4 D. Claim 4. Failure To Disclose Material Evidence
5 (Samuelson)

6 In petitioner's fourth claim for relief (pet. at 31-44),
7 he alleges that the prosecution failed to disclose fully the
8 benefits given to witness Bruce Samuelson in exchange for his
9 testimony, thereby denying petitioner his rights in violation of
10 the Fifth, Sixth, Eighth, and Fourteenth Amendments. In
11 particular, petitioner alleges that witness Bruce Samuelson
12 falsely testified as to the scope and nature of the benefits he
13 received from the prosecution in exchange for his testimony, and
14 that the prosecution failed to correct this false testimony at
15 the time it was made.

16 In support of this legal claim, petitioner specifically
17 alleges that Bruce Samuelson was asked during his trial testimony
18 what "in exchange for agreeing to testify" he had "been offered
19 . . . from the San Joaquin County District Attorney's office."
20 (Pet. at 35:19-20, 36:1-2.) In response, Samuelson testified
21 that the district attorney's office had stated that it "would
22 recommend a one-year county jail sentence with a felony
23 conviction" as opposed to "[g]oing to state prison." (Pet. at
24 36:3-7.) Petitioner further alleges that, on cross-examination,
25 Samuelson agreed with defense counsel that he had been "given a
26 promise by the prosecution" for "a recommendation" of a sentence
27 of "a year in the county jail." (Pet. at 36:9-15.)

1 In support of the allegation that this was false
2 testimony, which should have been disclosed to him, petitioner
3 alleges that "contrary to Samuelson's sworn testimony which went
4 uncorrected by the District Attorney, there was an agreement
5 between the District Attorney and Samuelson . . . which later was
6 verified in court on the record at a December 14, 1982 municipal
7 court hearing . . . that four felony charges pending against
8 Samuelson would be dismissed in exchange for his testimony
9 against petitioner and that Samuelson's sentence would be one
10 year and it would be served locally at the county jail." (Pet.
11 at 38:13 - 39:1 emphasis original.)

12 The warden has both admitted and affirmatively alleged in
13 his answer to this claim the following facts: The warden has
14 admitted that at the time of petitioner's trial, Bruce Samuelson
15 was a prosecution witness against petitioner and that in exchange
16 for his testimony against petitioner, the San Joaquin County
17 District Attorney's Office negotiated a plea agreement with Mr.
18 Samuelson. The warden further has admitted that the terms of the
19 plea agreement were put on the record in open court in Mr.
20 Samuelson's case in Municipal Court for the Stockton Judicial
21 District in San Joaquin County on or about December 14, 1982.
22 The warden further has admitted that pursuant to that on the
23 record agreement, the district attorney agreed to dismiss 4 of 6
24 pending felony charges and to would recommend that Samuelson
25 receive felony probation and jail time of no more than one year.
26 The warden further has admitted that at the time of Samuelson's
27 testimony at petitioner's trial on or about March 29, 1983, he

1 testified that the district attorney's office had stated that in
2 exchange for his testimony against petitioner it "would recommend
3 a one-year county jail sentence with a felony conviction" as
4 opposed to "[g]oing to state prison." The warden further has
5 admitted that on cross-examination, Samuelson agreed with defense
6 counsel that he had been "given a promise by the prosecution" for
7 "a recommendation" of a sentence of "a year in the county jail,"
8 and that his case had been put over until April 11, 1983, for a
9 probation violation order to show cause and "for a pre-trial
10 conference." Except as admitted above, the warden has
11 specifically and generally denied all other additional
12 allegations in claim 4.

13 The warden also has affirmatively alleged in response to
14 claim 4 that as part of the plea agreement placed on the record
15 in Municipal Court in Samuelson's case on December 14, 1982, the
16 terms of the plea agreement were not guaranteed to Samuelson. In
17 particular, the warden has affirmatively alleged that Mr.
18 Samuelson was specifically advised by the judge at that hearing
19 as to the non-binding nature of the agreement under California
20 law as follows: "[i]f the Superior Court Judge in Superior Court
21 decides after reading the probation report that he doesn't wish
22 to give you a year in county jail, but wanted to send you to
23 state prison or to give you some harsher treatment than that, you
24 would have a right to [withdraw your plea and] return here to
25 this court."

26 The warden further has affirmatively alleged that these
27 on-the-record admonitions to Mr. Samuelson correctly articulate

1 the rule of law in California that the prosecution has no power
2 to guarantee any criminal defendant any particular disposition of
3 criminal charges as part of a plea agreement because the all plea
4 dispositions must be approved by a judge before they can be
5 carried out and that the judge has the power to reject the plea
6 agreement should the judge find the terms of the agreement
7 inappropriate.

8 One simple answer to petitioner's claim is that it is
9 legally and factually false. Under California law, a prosecutor
10 is without the power to bind the trial judge to any negotiated
11 disposition. The trial judge retains the discretion to reject
12 any negotiated plea agreement made by the prosecution anytime the
13 judge finds the proposed sentence is too lenient. Thus, the
14 prosecutor could not as a matter of law have guaranteed Samuelson
15 a one year county jail sentence, given the possibility that the
16 sentencing judge could reject it as too lenient.

17 This undisputable fact of California law is supported by
18 the very evidence that petitioner relies upon to advance his
19 claim that Samuelson's proposed one-year county jail sentence was
20 guaranteed. As noted in the municipal court transcript attached
21 as Exhibit F to the amended petition and affirmatively alleged as
22 true in the answer, the municipal court judge in Samuelson's car
23 theft and forgery case specifically advised him that his
24 negotiated plea was not guaranteed: "[i]f the Superior Court
25 Judge in Superior Court decides after reading the probation
26 report that he doesn't wish to give you a year in county jail,
27 but wanted to send you to state prison or to give you some

1 harsher treatment than that, you would have a right to [withdraw
2 your plea and] return here to this court. . . ." (See Pet. at
3 245-49, 246:27 - 247:3.)

4 Apart from this simple and dispositive defect in
5 petitioner's claim, petitioner cannot obtain relief on this claim
6 for the equally simple reason that he cannot meet the legal
7 standard needed to obtain relief. Even if petitioner's
8 allegations were assumed true for the sake of argument only, they
9 fail to meet the test of materiality that defines the
10 constitutional duty of prosecutors to turn over to the defense
11 exculpatory or impeachment evidence.

12 Under the Due Process Clause of the Fourteenth Amendment,
13 a state prosecutor has a duty "to assist the defense in making
14 its case," by producing to the defense before and during trial
15 both exculpatory and impeachment evidence. United States v.
16 Bagley, 473 U.S. 667, 675 n.6, and 676, 105 S. Ct. 3375, 87 L.
17 Ed. 2d 481 (1985); United States v. Agurs, 427 U.S. 97, 107, 96
18 S. Ct. 2392, 49 L. Ed. 2d 342, (1976). This does not mean,
19 however, that prosecutors have a "'duty to report sua sponte to
20 the defendant all that they learn about the case and about their
21 witnesses'" that "might have helped the defense or might have
22 affected the outcome of the trial." United States v. Agurs, 427
23 U.S. at 109-110, id. at 112 n.20.

24 Instead, if a prosecutor is in possession of evidence that
25 is "highly probative of innocence," he "is presumed to recognize
26 its significance even if he has actually overlooked it" and is
27 under a constitutional duty to turn it over to the defense. Id.

1 at 110. The duty therefore exists only "if the omitted evidence
2 created reasonable doubt that did not otherwise exist, [and]
3 constitutional error has been committed." Id. at 112.

4 When the absence of the undisclosed evidence from the
5 trial creates reasonable doubt that did not otherwise exist, the
6 failure to disclose "'undermine[s] confidence in the outcome of
7 the trial,'" Kyles v. Whitley, 511 U.S. ___, 115 S. Ct. 1555,
8 1565, 131 L. Ed. 2d 490, 506 (1995) and requires a new trial. On
9 the other hand, "[i]f there is no reasonable doubt about guilt
10 whether or not the additional evidence is considered, there is no
11 justification for a new trial." United States v. Agurs, 427 U.S.
12 at 112-113.

13 Assuming but not conceding the truth of petitioner's
14 allegations, petitioner's claim is that the prosecutor failed to
15 disclose to the defense that he had actually guaranteed, not just
16 promised to "recommend," that Samuelson would not be sent to
17 state prison, as opposed to county jail, in exchange for his
18 testimony. Thus, in petitioner's view, the undisclosed
19 distinction between a guaranteed county jail sentence and a
20 recommended county jail sentence prison could reasonably be taken
21 to put the whole case in such a different light as to undermine
22 confidence in the verdict and create reasonable doubt as to the
23 jury's finding of guilt that did not otherwise exist.

24 The warden disagrees. On this record, any alleged
25 undisclosed distinction between a guaranteed county jail sentence
26 and a recommended county jail sentence for Samuelson's testimony
27 cannot be neither "highly probative of innocence," United States

1 v. Agurs, 427 U.S. at 110, nor does it "create[] reasonable doubt
2 that d[oes] not otherwise exist," id. at 112, with respect to the
3 jury's finding of guilt. In other words, the allegation does
4 nothing to "'undermine[] confidence in the outcome of the
5 trial.'" Kyles v. Whitley, 115 S. Ct. at 1565.

6 A close examination of Samuelson's actual testimony
7 reveals that defense counsel focused his entire cross-examination
8 of Samuelson on laying the evidentiary foundation for his
9 eventual argument to the jury that Samuelson was a savvy
10 jailhouse lawyer who had fabricated his testimony, based on talk
11 going around in the jail and his own special knowledge of
12 criminal law, in an effort to curry favor with the prosecution
13 and to avoid going to state prison for up to 13 years in his own
14 pending criminal cases. Given the evidence presented and the
15 arguments based thereon, there is absolutely no reason to believe
16 that the alleged "guaranteed" county jail sentence would have
17 made one bit of difference in the jury's finding of guilt.

18 Bruce Samuelson testified at petitioner's trial on March
19 29, 1983. (RT 2271.) At the time of trial, Samuelson testified
20 that he was 22 years old and first met petitioner in April 1982
21 in the maximum security section of the San Joaquin County Jail.
22 At the time of this meeting, Samuelson was serving a one-year
23 sentence for two second-degree felony burglary convictions. (RT
24 2331.)

25 Samuelson had certain jail privileges at the time that
26 allowed him to deliver to petitioner in the maximum security
27 section pens and envelopes from another inmate. Samuelson made

1 two such deliveries to petitioner before he was transferred out
2 of county jail to an honor farm. Samuelson was released from the
3 jail on June 2, 1982. (RT 2332.)

4 On November 3, 1982, Samuelson was arrested in Arizona for
5 a California charge of possession of a stolen vehicle. Samuelson
6 was returned to Stockton, California, and charged with one count
7 of vehicle theft, two counts of receiving stolen property, and
8 three counts of forgery. At the time of Samuelson's testimony on
9 March 29, 1983, he testified that all but one of the six charges
10 were still pending against him. He further testified that while
11 one of the forgery charges was no longer pending against him, he
12 had been in custody continuously since he was arrested on
13 November 3, 1982 until the time of his testimony on March 29,
14 1983, and that his next court date on the charges was set for
15 April 11, 1983. (RT 2332-33, 2373.)

16 Samuelson further testified that in exchange for agreeing
17 to testify against petitioner, Samuelson had been offered by the
18 district attorney's office a one-year county jail sentence
19 recommendation, as opposed to a state prison sentence
20 recommendation. (RT 2341-42, 2371.) Samuelson further testified
21 that, with good time work time credits, he expected to actually
22 serve only six months in county jail. (RT 2372.) He also
23 testified that he was also on probation for his two prior
24 burglary convictions, and had been told and expected that his
25 then-pending and unresolved probation violation on those
26 convictions would either be dismissed or go on record as a
27 violation without him being sentenced to state prison. (RT

1 2372.) Samuelson testified that he previously had waived five
2 months county jail time on his burglary convictions in order to
3 avoid going to state prison for three years, but that he still
4 "doubt[ed] it very seriously" that he would be sentenced to state
5 prison on the unresolved probation violation. (RT 2346-48,
6 2372.) Samuelson further testified that he had been in custody
7 outside San Joaquin County ever since he came forward, and that
8 he did not expect to serve as a sentence on his pending charges
9 any further county jail time in San Joaquin County. (RT 2372-
10 73.)

11 On November 10, 1982, Samuelson was returned to Stockton,
12 California, and placed in protective custody in the maximum
13 security section in cell-block eight. Samuelson was first placed
14 in cell 14 and then, because of a "nonuseable" sink and toilet,
15 Samuelson was placed three hours later in cell 12, across from
16 petitioner's cell, cell 10, at an angle. The distance between
17 petitioner and Samuelson was about four and a half feet. The
18 cells are staggered at 30 to 45 degree angles across from one
19 another. (RT 2333-34, 2342.)

20 Samuelson and petitioner greeted each other, and on or
21 about November 11th after Samuelson had returned from court,
22 Samuelson and petitioner began "to discuss some technicalities
23 about [petitioner's] case." Samuelson was acting as his own
24 attorney at the time and discussed with petitioner possible
25 "actions on behalf of the defense [in petitioner's case] to
26 exclude certain witnesses." (RT 2335.)

27

1 Beginning around the 15th of November 1982, and continuing
2 for approximately two weeks thereafter, petitioner told Samuelson
3 about how he killed Terri Winchell. (RT 2340.) Samuelson
4 testified that petitioner told him¹² that he received a
5 telephone call from his cousin, who was going to meet with the
6 victim. Petitioner further stated that approximately a half hour
7 later, he received another telephone call his cousin, this time
8 from the Weberstown Mall area, who had picked up the girl and was
9 en route to the house. (RT 2336.)

10 Upon arrival at the house, one of the females at the house
11 was asked to go purchase some liquor or something else at the
12 store, and petitioner had prepared to go out with a small thin
13 belt he was wearing, a kitchen knife, and a hammer. They then
14 left in the car via city streets through town northbound towards
15 Lodi until they reached the outskirts of town outside of hearing
16 distance from anyone else. Petitioner told Samuelson that they
17 drove out that distance to avoid detection. (RT 2336-37.)

18 As they were driving, petitioner attempted to strangle the
19 victim with his belt, but it broke. As petitioner first
20 attempted to strangle her, she tried to grab it and pull it away.
21 She was making noises, screaming for help, and eventually fell

22 12. Petitioner's defense counsel moved to exclude
23 Samuelson's testimony concerning petitioner's admissions on the
24 grounds that the statements were hearsay, and that Samuelson,
25 because he was a witness in custody testifying "for leniency or
26 favors," he was incompetent to testify without a preliminary
27 finding of fact concerning his credibility. The trial court
overruled both objections, stating that the statements were
admissible under California Evidence Code section 1220, subject
to cross-examination by defense counsel concerning Samuelson's
credibility. (RT 2335:18 - 2336:8.)

1 forward and passed out unconscious. Petitioner grabbed her hair
2 and pulled her back and started beating the back of her head with
3 a hammer. Petitioner could not remember how many times he hit
4 her with the hammer, but it was several blows, severe blows to
5 the back of her head. (RT 2337-38.)

6 After about 15 minutes went by from the time they had left
7 town until the last blow to the head, petitioner told his cousin
8 to pull over and stop the car. Petitioner then took her body out
9 of the car and dragged her by her feet face down across the
10 pavement and into a field. Petitioner then thought to himself
11 that there was "no use wasting a good piece of ass" so he decided
12 to "bone it." Petitioner then raped the victim. (RT 2338.)

13 Since petitioner's intent "to begin with" was to kill the
14 victim, petitioner "wanted to make sure" she was dead, so he then
15 stabbed her four times. Petitioner didn't really know if she was
16 alive at that point. He then got up, started to walk away, but
17 then turned around and called her a "fucking bitch." (RT 2338-
18 39.)

19 During this time, petitioner's cousin had been driving
20 around keeping watch for any persons in the area. Petitioner
21 then met his cousin at the car and threw the weapons and the belt
22 into the trunk of the car. They returned to the house where
23 there were two girls, Raquel and Pat. Petitioner dumped the
24 purse on the table, (RT 2339-40), and went to hide the belt, and
25 to wash the hammer, knife, and car. They first cleaned the
26 weapons, then they went outside and used a hose and some rags.

27

1 (RT 2339.) One of the girls went outside with petitioner and
2 questioned him why he was using the hose. (RT 2339-40.)

3 Petitioner put one of the weapons, the knife, in the
4 refrigerator. He also took eleven dollars from the purse and
5 used it to buy two packs of cigarettes, a six-pack of beer, and
6 some wine. (RT 2340.)

7 While in custody, petitioner and Samuelson discussed a
8 book called "Prescription Murder" that involved a case in Texas
9 where a doctor had killed his first wife by injecting his wife
10 with a cultured mixture containing feces that went undetected,
11 and attempted to kill his second wife with an injection of
12 procaine hydrochloride. Petitioner asked Samuelson if there was
13 any way Samuelson could get released "OR" or on bail and assume
14 the same situation with one of the girls, particularly Raquel.
15 Petitioner told Samuelson that he would probably find Raquel
16 living with her parents and younger sibling in Woodbridge, and
17 that if she wasn't there, she had relatives strung out from
18 Stockton or Woodbridge to Los Angeles. Petitioner told Samuelson
19 that he did not know where Pat was living but that Samuelson was
20 probably smart enough to find out for himself. (RT 2340-41.)

21 On cross-examination, defense counsel elicited admissions
22 from Samuelson that he was living in the Stockton area in the
23 early part of 1981, and that by March of that year, he was in
24 custody on a petty theft charge at the same time petitioner and
25 Rick Ortega were in custody and having their preliminary hearing.
26 Samuelson admitted that there was talk in the jail about Morales
27 and Ortega being held for on murder charges, but denied being

1 privy to any of those conversations or having any curiosity about
2 the case. In Samuelson's words: "I don't like to become familiar
3 with too many cases other than my own." (RT 2343-45, 2345:11-
4 12.)

5 Defense counsel further elicited admissions from Samuelson
6 that, after his release on the 18th of April, he was back in
7 custody on the 28th of May on four counts of burglary. Counsel
8 then elicited an admission from Samuelson that the district
9 attorney's office had sought a three year state prison sentence,
10 until Samuelson's Youth Authority parole officer recommended that
11 he be recommitted to the Youth Authority. Samuelson then
12 admitted that he was rejected by the Youth Authority as
13 unamenable before the trial judge gave him another "break" by
14 sentencing him to a year in county jail contingent on Samuelson
15 waiving all of the five months he had already served in county
16 jail. Samuelson admitted that pursuant to that plea agreement,
17 he waived all credit for time served in custody prior to October
18 1, 1981, and served time in county jail from that date to June 2,
19 1982, and then was released on probation on certain terms and
20 conditions. (RT 2345-49.)

21 Defense counsel then got Samuelson to admit that after he
22 was arrested and put back into custody in November 1982 on the
23 car theft and forgery charges, he was also charged with a
24 probation violation on his burglary convictions that was still
25 pending. Defense counsel then got Samuelson to admit that on both
26 the new charges and the probation violation, he was facing as
27 much as 13 years in state prison. (RT 2349-52.) Defense counsel

1 then asked Samuelson if the circumstances of his two case
2 suggested to him that he was "certainly headed for prison," but
3 Samuelson would only concede that he "was not sure" he was headed
4 for prison and that he thought he still had a 50/50 chance of
5 beating the charges against him acting as his own attorney with
6 a court-appointed advisor. (RT 2352-53.)

7 Defense counsel then elicited admissions from Samuelson
8 that he had seen in petitioner's cell piles of police reports and
9 transcripts, and Morales had made mention of them. Samuelson
10 further admitted to defense counsel that he had been shown some
11 of petitioner's reports and had actually held and read "a couple
12 of sentences" in either a criminalist's report from petitioner's
13 case, or the criminalist's preliminary hearing testimony
14 concerning semen and blood typing. Defense counsel also got
15 Samuelson to concede that he had read a page in petitioner's
16 preliminary hearing transcript concerning someone seeing
17 something in the house and someone else saying it was not there.
18 (RT 2353-58.)

19 Samuelson further admitted to defense counsel that at some
20 time while he was in county jail he had "free roam" of the jail
21 that was not afforded to others because he was a trustee. (RT
22 2355.) Defense counsel further got Samuelson to admit that he
23 had seen Greg Winchell in custody with him and had heard "rumors"
24 that Greg Winchell was Terri Winchell's brother. (RT 2362.)

25 Defense counsel then extracted from Samuelson admissions
26 that he had been in protective custody from July 1981 until his
27 release to the honor farm more than four months later, and that

1 the reason he was placed there was that other inmates thought he
2 was "a snitch" or a "cop" and that he was there to elicit
3 information from people and then to give it to the prosecution.
4 Defense counsel also drew from Samuelson an admission that he was
5 placed in protective custody to insure his physical well-being
6 from other inmates, and that he now had what was called "a snitch
7 jacket." Samuelson admitted that he was immediately placed back
8 into protective custody upon his return to jail in November 1982.
9 In making these admissions, Samuelson gratuitously explained that
10 certain inmates in the jail knew he was taking college courses as
11 an administration of justice major, and had erroneously assumed
12 he was a cop. (RT 2364-66.)

13 Defense counsel then got Samuelson to concede that he
14 faced the possibility of going to prison with a snitch jacket,
15 and that in prison he would be placed in protective custody
16 segregated from everyone else. Samuelson acknowledged to defense
17 counsel that he was "interested in trying to avoid going to
18 prison," and that, to that end, he wrote a letter to the
19 prosecutor advising him that he could guarantee him a murder and
20 special circumstances conviction in petitioner's case. (RT 2366-
21 68.)

22 Defense counsel then got Samuelson to admit that, in the
23 letter, he had stated if the information in Morales' case was not
24 enough to persuade the prosecution to make a deal, he also put in
25 the letter to the prosecutor that he also had information on
26 another death penalty case against James Mahoney, information on
27 "many" drug sales in North Stockton, and some of the biggest

1 dealers in town. Defense counsel evoked from Samuelson an
2 admission that he "was pulling out all stops and offering just
3 about any sort of information" he could. (RT 2368-70.) Defense
4 counsel then concluded his cross-examination by going over the
5 prosecution's promise of recommendation of a year in county jail,
6 and the likelihood that Samuelson would have little time left to
7 serve if that were his sentence on both his theft and forgery
8 charges and his probation violation. Counsel then implied
9 through questioning, and Samuelson did not testify otherwise,
10 that Samuelson's cases had been put over until April 11, 1983
11 "[t]o see how you do here." (RT 2370-73.) The prosecutor
12 declined to conduct any redirect questioning of Samuelson. (RT
13 2374.)

14 All of this laid the evidentiary groundwork for defense
15 counsel's eventual argument to the jury in closing that
16 Samuelson's testimony was not worthy of belief. One of defense
17 counsel's major themes to the jury was that "nobody puts him
18 [Morales] in the car. Nobody sees him in the car at the time
19 that Terri was -- was killed. In fact nobody ever saw him get
20 into the car from the testimony that you've heard from the stand,
21 . . . obviously Samuelson, because he's usually in jail." (RT
22 2608-09.)

23 Defense counsel's argument to the jury thus focused on the
24 fact that "the testimony about what happened in the car is coming
25 in by way of what we call, in legal terms, an admission." (RT
26 2609.) Counsel emphasized to the jury that admissions, by
27 definition, did not themselves acknowledge guilt, but only tended

1 to prove guilt when considered with the other evidence, and that
2 it was entirely up to the jury to decide if petitioner made
3 admissions. In so doing, counsel stressed that California law
4 required the jurors to view petitioner's oral statements with
5 caution and skepticism because of the possibility of
6 misapprehension, faulty recall, and misrepresentation. (RT 2609-
7 10.)

8 Defense counsel also emphasized to the jury that the
9 instructions concerning how the jury was to evaluate witness
10 credibility, twice singling out the fact that the credibility
11 instruction allowed the jury to consider Samuelson's two prior
12 felony convictions. (RT 2611-12.)

13 Defense counsel then focused on Samuelson's demeanor,
14 describing Samuelson as "the essence of a what you might call a
15 con man" (RT 2612:12-13), "very . . . streetwise, very
16 articulate," who had appeared to attempt to "ingratiate himself
17 with you [the jury] or the prosecution by throwing in little
18 things like how he's working in police administration . . . " (RT
19 2612:14-18), which counsel urged, reflected nothing more than the
20 fact that Samuelson was "attempting to educate himself in terms
21 of perhaps being a little more sophisticated [and] . . . keeping
22 out of trouble." (RT 2612:25-26.) Defense counsel summed up
23 Samuelson's testimony and "the way he talked" about certain
24 things as giving the "impression that he knows his way around the
25 courts and is a pretty manipulative sort of person." (RT 2613:1-
26 3.)
27

1 Defense counsel then went straight into an attack on
2 Samuelson's testimony that he was not predisposed to following
3 anyone's criminal case but his own. Counsel quoted to the jury
4 Samuelson's testimony that "I don't like to become too familiar
5 with too many cases other than my own" and impeached it with
6 Samuelson's written statements to the prosecutor, revealing that
7 "he was terribly interested in a number of cases, Mr. Morales'
8 case, another death penalty case, cases involving drug sales in
9 north Stockton involving several dealers." (RT 2613:9-14.) Thus,
10 counsel directly called into "question his [Samuelson's]
11 statements about not being too familiar and not hearing things in
12 jail about the case prior to testifying." (RT 2613:15-17.)
13 Counsel stressed that "news about what goes on at the jail and
14 about people at the jail certainly gets around a lot more than
15 Mr. Samuelson would lead us to believe" given that Samuelson
16 himself testified that a "rumor had been spread throughout the
17 jail" about Samuelson so that "he needed to be put in protective
18 custody." (RT 2613.)

19 Defense counsel also sought to depict Samuelson as
20 desperately using this case to avoid going to prison for 13
21 years. Counsel began by directly challenging Samuelson's
22 testimony that he thought he had a 50/50 chance of beating the
23 charges against him: "And yet if he had that good a chance of
24 beating the charges, I wonder why he is in such desperation
25 indicated he could testify in three or four more different
26 cases." (RT 2614:1-3.) Counsel explained: "It's obvious, I
27

1 think, he has a bias, an interest and a motive. He said he was
2 looking -- the most he could get was 13 years." (RT 2614:8-10.)

3 Counsel explained to the jury that despite Samuelson's
4 testimony to the effect that he might not go to prison, the fact
5 that Samuelson had a prior record where he "almost" went to
6 prison and had to waive five months time in custody in order to
7 do so, and then was picked up again after only five months out of
8 custody, "indicates he was in pretty hot water and that he
9 certainly didn't want to go to prison. And he didn't want to go
10 to prison with a snitch jacket." (RT 2614:11-19.)

11 Defense counsel thus summed up Samuelson's interest and
12 bias by asking the jury to take an objective look at what
13 Samuelson was facing:

14 "So I think in terms of how much of an interest he has
15 in coming through for the prosecution can be determined by
16 what he was facing, which was certainly not only a lot of
17 time, but under the circumstances of him being an
18 informant or a snitch or whatever you want to call him,
19 the time he was doing was going to be time that I don't
20 think he was looking forward to." (RT 2614:20-26.)

21 Defense counsel then sought to portray Samuelson's
22 testimony as fabricated and specifically tailored by Samuelson to
23 support a torture murder special circumstance allegation.
24 Counsel began by seizing upon the prosecutor's characterization
25 of Samuelson as a "jailhouse lawyer" during the prosecutor's
26
27

1 opening argument.¹³ Counsel stated to the jury: "I think Mr.
2 Garber's assessment of him as a jailhouse lawyer is pretty good."
3 (RT 2615:4-5.) Counsel explained this agreement by stating that
4 some of Samuelson's testimony presented a "pretty good case for
5 torture," and was so good that it appeared "tailored" to prove
6 "torture and special circumstances." (RT 2615:2-13.)

7 As counsel emphasized to the jury that Samuelson had put
8 in his letter to the prosecutor that he "could guarantee a first
9 degree murder conviction with special circumstances" and asked
10 the jury to think about why Samuelson put that in the letter.
11 Counsel then suggested to the jury that "maybe being a jailhouse
12 lawyer, he's looked up a little bit of the law in the jail and
13 knows what some of the elements are of first degree murder and
14 special circumstances?" (RT 2615:15-18.)

15 Counsel then suggested that proof that Samuelson's
16 testimony was fabricated as a result of research Samuelson must
17 have done could be found in the fact that his testimony was
18 contradicted by the physical evidence of the murder itself.
19 Counsel pointed out to the jury that Samuelson had testified that
20 petitioner had rendered Terri Winchell unconscious before he
21 started hitting her with the hammer. Counsel explained: ". . .
22 if that were true, then that sort of does look like torture. If
23

24
25 13. During the prosecutor's opening argument, he urged
26 the jury to believe that petitioner had actually approached
27 Samuelson based on evidence that Samuelson was "sort of a
jailhouse lawyer," and "before you know it, Mike Morales is
telling Bruce Samuelson about his case. And I submit this is
pretty logical and understandable." (RT 2560:6, 2560:14-17.)

1 a person is unconscious, what's the purpose of hitting him?" (RT
2 2615:26-28.)

3 Counsel then sought to convince the jury that the
4 testimony was not true because it conflicted with the testimony
5 of other witnesses and the physical evidence of the murder.
6 Counsel pointed out that Samuelson's testimony that petitioner
7 had strangled Terri Winchell for about a minute to minute and a
8 half until she was unconscious was contradicted by the
9 pathologist's testimony that "he saw nothing wrong with the neck,
10 no bruising, no lacerations." (RT 2616:1-12.)

11 After counsel attacked the credibility of petitioner's
12 girlfriend and roommate as to additional admissions made by
13 petitioner, counsel asserted to the jury that their collective
14 accounts reflected "three different versions here" that did not
15 amount to proof beyond a reasonable doubt. (RT 2630:3-11.)
16 Counsel then returned to his argument that Samuelson's "little
17 story" was tailored to meet "a torture sort of theory," which
18 Samuelson must have "learned from his law books or his
19 administration of justice courses." (RT 2630:12-17.) He concluded
20 his remarks as to Samuelson by pointing out that Samuelson may
21 have gotten the law right, but he got the facts wrong when he
22 testified that the knife was put in the refrigerator and the
23 evidence showed that it was the hammer that was discovered in the
24 refrigerator. (RT 2630:18-25.)

25 Any alleged undisclosed distinction between a guaranteed
26 county jail sentence and a recommended county jail sentence for
27 Bruce Samuelson cannot, on the above-described record, create

1 reasonable doubt that did not otherwise exist with respect to the
2 jury's finding of guilt. It is clear that the defense had been
3 made sufficiently aware of numerous details concerning
4 Samuelson's background so as to allow the defense to conduct a
5 detailed cross-examination and to argue that Samuelson's
6 unresolved charges and probation violation gave him an incentive
7 to fabricate and color his testimony in the light most favorable
8 to the prosecution so as to increase the likelihood of him
9 receiving the recommended county jail sentence at the time of his
10 sentencing.

11 Given this record, if the jury knew that the proposed jail
12 sentence was somehow guaranteed by the prosecution, such a
13 disclosure would have done little to strengthen the attack
14 actually mounted against Samuelson's credibility. Indeed, it was
15 the fact that the proposed sentence was not guaranteed that
16 formed the evidentiary basis of the defense claim that Samuelson
17 was lying in an attempt to gain favor for himself at his then-
18 upcoming burglary probation violation hearing and auto
19 theft/forgery pretrial conference. If the sentence was
20 guaranteed, then the defense would have been without the
21 evidentiary basis to argue Samuelson had testified falsely in
22 hopes of currying favor with the prosecutor and the sentencing
23 judge, because the guaranteed sentence would not have been in any
24 way contingent on currying favor with anyone.

25 On this record, and giving petitioner the benefit of the
26 doubt, the most one can say about any alleged undisclosed
27 distinction between a recommended county jail sentence and a

1 guaranteed county jail sentence is that such a revelation "might
2 have helped the defense or might have affected the outcome of the
3 trial." United States v. Agurs, 427 U.S. at 109-110, id. at 112
4 n.20. Such evidence, however, is not material within the meaning
5 of the Constitution. It cannot be said that the alleged
6 undisclosed evidence made the prosecution's "case much stronger,
7 and the defense case much weaker, than the full facts would have
8 suggested." Kyles v. Whitley, 115 S. Ct. at 1575. Any deviation
9 from this rule would require the creation of a new rule of law in
10 violation of Teague v. Lane, 489 U.S. 288 (1989). Petitioner
11 cannot obtain an evidentiary hearing on this claim and the claim
12 should be denied on its merits.

13 In his skeletal motion for an evidentiary hearing
14 petitioner points to a handful of documents that -- he says --
15 entitle him to an evidentiary hearing. He gives no explanation
16 for the relevancy or importance of any of these documents, and
17 indeed makes no specific reference to their individual relevance.
18 Apparently petitioner (through his counsel) would prefer to have
19 respondent's counsel or the court do the work of actually
20 analyzing the claims. But petitioner's utter failure to present
21 any kind of coherent argument as to specifically why he is
22 entitled to a hearing renders these claims conclusory and wholly
23 devoid of specifics, such that an evidentiary hearing is not
24 necessary. Campbell v. Wood, 18 F.3d at 679. Indeed, as
25 respondent will show, the items identified by petitioner do not
26 entitle him to an evidentiary hearing.

27

1 Exhibit 1 consist of the transcript of an interview of
2 Bruce Samuelson. The interview was conducted on August 4, 1993
3 by the California Attorney General's Office. During the
4 interview, Samuelson states he has not reviewed any materials or
5 documents regarding the case in the last decade. Samuelson says
6 he "went into the hole" because he has a temper and wanted to
7 avoid fighting, and he could protect his belongings -- including
8 his court papers -- if he was removed from the general
9 population. Ex. 1 at 9-12.

10 Samuelson was aware of claims that he had been planted to
11 obtain incriminating evidence from petitioner. Those claims were
12 untrue. Ex. 1 at 13. Samuelson did not even know who petitioner
13 was until asked about petitioner by another inmate, possibly an
14 inmate named "Stony." Ex. 1 at 13. This inmate asked whether
15 petitioner was in "the hole." When Samuelson asked petitioner if
16 he was Mike Morales, petitioner reacted in a hostile manner. Ex.
17 1 at 15.

18 Samuelson describes the configuration of this portion of
19 the jail. Samuelson's cell was located diagonally in relation to
20 petitioner's cell. Ex. 1 at 16-17.

21 Samuelson explained how he became acquainted with
22 petitioner. Petitioner drew pictures and displayed them to other
23 inmates. Samuelson admired these drawing and petitioner offered
24 to draw something for Samuelson. Ex. 1 at 18.

25 Samuelson was busy at work on his own case when petitioner
26 began questioning Samuelson about Samuelson's case. Ex. 1 at 19.
27 Petitioner then asked Samuelson technical and supposedly

1 hypothetical questions such as, if a deceased was stabbed,
2 whether bleeding would occur. Samuelson said he would ask a
3 doctor friend. Ex. 1 at 20. Petitioner later returned to
4 question Samuelson, when petitioner described the murder in
5 detail. Ex. 1 at 50.

6 At this point Samuelson and petitioner began conversing in
7 Spanish because petitioner feared other inmates would eavesdrop.
8 Ex. 1 at 21. Both men were conversant in Spanish. Ex. 1 at 23.
9 The two would also communicate with written notes. Ex. 1 at 25.
10 They also wanted to talk at night to avoid other inmates. Ex. 1
11 at 25.

12 Petitioner asked Samuelson for help with petitioner's
13 case. Samuelson agreed, knowing nothing about petitioner's case.
14 Ex. 1 at 21.

15 As petitioner was describing the dead person and the
16 stabbing, he added more details. Ex. 1 at 23.

17 Petitioner discussed his homosexual cousin, and claimed
18 his cousin was doing time for the same crime as petitioner. Ex.
19 1 at 27.

20 Petitioner told Samuelson the background of the crime --
21 that the victim was in a romantic triangle involving petitioner's
22 homosexual cousin and the cousin's bisexual boyfriend.
23 Petitioner's cousin believed the victim was the instigator. Ex.
24 1 at 29. Petitioner wanted to teach the victim a lesson about
25 "messaging with family." Ex. 1 at 29-30.

26 Petitioner explained to Samuelson how the victim was lured
27 away. Ex. 1 at 30.

1 Petitioner and Samuelson discussed whether the crime
2 involved kidnapping because the victim had voluntarily gotten
3 into the vehicle. Samuelson said it was a "gray area." Ex. 1 at
4 32.

5 Petitioner explained various factual details leading up to
6 the abduction. Ex. 1 at 33-35.

7 Samuelson questioned petitioner as to why they would have
8 gone to Lodi and Woodbridge from Stockton. Ex. 1 at 35-36.

9 Petitioner described the ruse that was used to explain
10 petitioner's presence in the car. Ex. 1 at 39-40.

11 Petitioner explained that the murder was planned to take
12 place within a particular time frame. Ex. 1 at 41.

13 Petitioner described the instruments he had with him: a
14 "vato" belt, a hammer and a knife. Ex. 1 at 42. Petitioner told
15 Samuelson he needed the knife and hammer "for punishment." Ex.
16 1 at 42.

17 Around this time petitioner asked Samuelson to serve as
18 petitioner's co-counsel. Ex. 1 at 42. Samuelson declined, but
19 said he would assist petitioner in preparation for trial. Ex. 1
20 at 43.

21 Samuelson got involved in petitioner's case. Ex. 1 at 43.
22 Samuelson wanted to know whether petitioner was disputing guilt
23 as a factual matter or instead intended a technical defense.
24 Petitioner claimed he "needed to fight technicalities." Ex. 1 at
25 43-44.

26 Samuelson had by now decided to tell someone in authority.
27 Samuelson was not seeking to benefit personally, but was

1 concerned there would otherwise be insufficient circumstantial
2 evidence to convict petitioner. Ex. 1 at 45.

3 Petitioner and Samuelson again discussed the facts,
4 including the weapons. Petitioner showed Samuelson a polaroid
5 photograph of petitioner holding the belt. When Samuelson asked
6 about the significance of the belt, petitioner said he had
7 attempted to strangle the victim with the belt. Ex. 1 at 45-46.

8 As petitioner described the drive to Lodi, Samuelson asked
9 for greater detail. Petitioner described Rocky giving him
10 predetermined signal that the crime could take place undetected.
11 Ex. 1 at 46.

12 Petitioner removed the belt, the hammer and knife that
13 were concealed under his shirt. Ex. 1 at 46.

14 Petitioner described in great detail how he killed the
15 victim. Ex. 1 at 47-49. Petitioner described why he used the
16 hammer rather than his fists -- it was "more fulfilling" and he
17 would avoid sustaining any bruises. Ex. 1 at 47.

18 Petitioner asked Samuelson whether he would be guilty of rape
19 if he sexually assaulted the victim while she was unconscious.
20 Ex. 1 at 49.

21 Samuelson was interested in obtaining information about
22 the case. Ex. 1 at 51.

23 Petitioner boasted that he would get away with the crime,
24 just as he had killed in the past and gotten away with it. Ex.
25 1 at 52.

26 Petitioner and Samuelson simulated asking trial-like
27 questions and answers. Petitioner was confident his cousin would

1 never testify against petitioner. Ex. 1 at 53. As part of this
2 mock trial, petitioner and Samuelson removed all the likely
3 witnesses who would testify against petitioner. Ex. 1 at 55.

4 They discussed petitioner's contradiction statements about
5 the location of the knife and the hammer. Ex. 1 at 56.

6 Petitioner and Samuelson discussed implicably petitioner's
7 version as the killer in the event his cousin elected to testify
8 against petitioner. Ex. 1 at 61.

9 Petitioner reiterated his request that Samuelson help him
10 in court. Ex. 1 at 61-62.

11 Petitioner reiterated his intent in protecting his cousin
12 as the motive for the murder. Ex. 1 at 62-63.

13 Petitioner predicted to Samuelson he will succeed in
14 having the trial venue changed because the case had been
15 published in newspapers. Samuelson reiterated that he was
16 unfamiliar with any publicity about the case. Ex. 1 at 64-65.

17 The two discussed the ethnic profile in jury profiles in
18 potential trial locations. Ex. 1 at 65.

19 Petitioner showed Samuelson where he has hidden a shank
20 within his cell. Samuelson now fears retaliation by petitioner if
21 Samuelson becomes an informant. Ex. 1 at 67. Samuelson
22 subsequently told jail officials about the hidden shank.
23 Samuelson was then moved to a different jail. Ex. 1 at 68-69.

24 The more Samuelson talked to petitioner, the more
25 Samuelson realized he has a crucial witness -- especially since
26 he did not expect petitioner's cousin to incriminate petitioner.
27 Ex. 1 at 70

1 Petitioner and Samuelson discussed the applicability of a
2 robbery-murder in light of petitioner's theft of the victim's
3 jewelry. Ex. 1 at 74.

4 Samuelson described the term of his arrangement with the
5 district attorney's office. Ex. 1 at 87. He said there "was not
6 that much of a plea bargain," and described the agreement as
7 insubstantial. He was declined witness protection. Samuelson
8 thought he had gotten a bad deal. Ex. 1 at 87.

9 In short, Exhibit 1 offers no support for an evidentiary
10 hearing.

11 Petitioner also claims Exhibit 4 entitles him to an
12 evidentiary hearing. Mot. at 7. His reference to Exhibit 4 is
13 puzzling. Exhibit 4 is a summary of the results of the district
14 attorney's polygraph examination of Samuelson. According to the
15 district attorney's polygraph examiner, Samuelson

16 was being truthful; that he did obtain the information
17 that he gave in a supplement to the Stockton Police
18 Department from Morales himself and he did not get it from
19 any other source.

20 Thus, Exhibit 4, squarely confirming that Samuelson's account was
21 truthful, and offers no support for petitioner's request for an
22 evidentiary hearing.

23 Exhibit 5 is merely a copy of the questions asked of
24 petitioner during the polygraph examination, and the raw chart of
25 petitioner's examination. Exhibit 5 thus offers no support for
26 petitioner's request for an evidentiary hearing.

27

1 In 1994 petitioner retained an expert to analyze the
2 district attorney's polygraph examination. Exhibit 6 is the
3 report of petitioner's expert, who determined that "it cannot be
4 concluded Samuelson was truthful" when he answered one of the
5 questions put to him. Ex. at 3.

6 The foregoing demonstrates that petitioner cannot offer
7 this court any significant evidence impeaching Samuelson or
8 undermining his trial testimony. On the contrary, petitioner
9 points to things that only confirm the truthfulness of
10 Samuelson's trial testimony, such as his recent interview by
11 respondent. And petitioner's discussion of polygraph evidence is
12 fundamentally misplaced here because the United States Supreme
13 Court has squarely held that there is simply no consensus that
14 polygraph evidence is reliable. United States v. Scheffer, ____
15 U.S. ____, [1996 WL 141151, March 31, 1998]. Ironically, however,
16 in this case a polygraph examination of Samuelson only reinforces
17 his credibility. And Exhibit 6, the opinion of petitioner's
18 polygraph examiner, does not even consist of an examination of
19 petitioner with an accompanying conclusion that petitioner is
20 answering untruthfully. It is merely the second-hand
21 interpretation by petitioner's expert of the test conducted by
22 the district attorney. And even petitioner's expert will only
23 say that, as to one of petitioner's responses, "it cannot be
24 concluded Samuelson was truthful." Ex. 6 at 3. Thus
25 petitioner's expert does not even the truthfulness of a variety
26 of petitioner's answers during the polygraph examination,
27

1 including Samuelson's answer that petitioner had confessed to him
2 (question 39 of the examination).

3
4 **E. Claim 5. Knowing Use Of Perjured Testimony (Samuelson)**

5 In petitioner's fifth claim for relief (pet. at 44-55), he
6 alleges that the prosecution knowingly used perjured testimony by
7 witness Bruce Samuelson, thereby denying petitioner his rights in
8 violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.
9 In particular support of this legal claim, petitioner alleges
10 that "it is entirely probable that the facts testified to by
11 Samuelson were provided to him by the District Attorney" (pet. at
12 47:23-24), because at petitioner's trial Bruce Samuelson
13 testified that petitioner's "confession began on November 15,
14 1982." (Pet. at 45:25-26.) Petitioner alleges that, in
15 contradiction of this testimony, Deputy District Attorney Bernard
16 Garber made an undated handwritten entry in Samuelson's case file
17 on an district attorney "evaluation" form that "had to have been
18 made on or before November 15, 1982" that stated: 'PX waived - D
19 to plead to Count 1 + 1 count of 470 for local. See BG re details
20 (D is to testify in Peo v. Morales - 187 w/ specials, D to remain
21 in custody) BG.'" (Pet. at 46:9-17.) This undated entry had to
22 have been made on or before November 15, petitioner alleges,
23 because at the bottom of this evaluation form there appears "a
24 stamp which reads: 'Receipt of a copy of this document is hereby
25 acknowledged:' followed by the handwritten entry: 'to D' and
26 signed 'BG 11/15,'" (pet. at 46:20-23), "or else the District
27 Attorney simply provided Samuelson with a copy of the blank form,

1 an unlikely and purposeless action." (Pet. at 46:27-28.) In
2 further support of this claim, petitioner alleges that another
3 inmate, James Kevin Mahoney, was housed near petitioner and
4 Samuelson "in approximately the second week of November 1982."
5 (Pet. at 51:11-12.) During that time, petitioner alleges that
6 according to Mahoney, "Morales did ask Samuelson some questions
7 regarding the meanings of certain medical or legal terms" but
8 that "Morales never discussed with, nor directed questions to,
9 Samuelson or anyone else regarding the facts surrounding the
10 allegations against him." (Pet. at 53:10-15.)

11 The warden has incorporated by reference into his answer
12 to Claim 5 all of his responses contained in his answer to Claim
13 4 above. The warden has both admitted and affirmatively alleged
14 the following facts as to Claim 5: On November 10, 1982, Bruce
15 Samuelson was placed in custody in the San Joaquin County Jail.
16 At petitioner's trial, Bruce Samuelson testified that "[o]nce
17 [Morales] began, that was about the 15th of November and
18 concluded with -- oh, I'd say in approximately two weeks . . ."
19 (RT 2340.) On December 14, 1982, in the case of People of the
20 State of California v. Bruce Samuelson, San Joaquin County
21 Municipal Court number 33852, Bruce Samuelson waived his right to
22 a preliminary hearing in the municipal court and Deputy District
23 Attorney Bernard Garber appeared on behalf of the People and
24 placed on the record the terms of a proposed plea agreement with
25 Mr. Samuelson that included custody in county jail and a plea to
26 one count of taking a vehicle and one count of forgery in
27 exchange for Samuelson's testimony against petitioner. An

1 undated entry appears in black ink in the San Joaquin County
2 District Attorney's Office file for Bruce Samuelson in this same
3 case that states at the top of the page under the heading
4 "EVALUATION": "PX waived - D to plead to Count 1 + 1 count of 470
5 for local See BG re details (D is to testify in Peo v Morales -
6 187 w/ specials, D to remain in custody) BG." There also appears
7 in the file at the very bottom-left of this same document a black
8 ink stamp that reads "Receipt of a copy of this document is
9 hereby acknowledged:" followed by the handwritten entry in blue
10 ink: "to D BG 11/15". The warden further has admitted and
11 affirmatively alleged that while Morales and Samuelson were in
12 custody together Morales did ask Samuelson some questions
13 regarding the meanings of certain medical or legal terms. The
14 warden further has admitted and affirmatively alleged that on
15 February 7, 1983, Deputy District Attorney Bernard Garber
16 requested a polygraph examination be conducted on Bruce
17 Samuelson. On February 8, 1983, the San Joaquin County District
18 Attorney's Office conducted a polygraph examination on Bruce
19 Samuelson to determine whether he was lying when he said that
20 Morales had told him he had killed Terri Winchell, and whether he
21 had obtained information about Terri Winchell's killing from a
22 source other than Morales. Based on this examination, the
23 polygraph examiner formed the opinion that Samuelson was truthful
24 as to the information contained in a supplement to the Stockton
25 Police report, and that Samuelson obtained that information from
26 Morales himself and no other source. Except as admitted above,
27

1 the warden has specifically and generally denied all other
2 additional allegations in claim 5.

3 It is a violation of due process to obtain a conviction by
4 the knowing use of perjured testimony. Napue v. Illinois, 360
5 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). This includes
6 both the deliberate presentation of false testimony and the
7 knowing failure to correct such testimony when it appears. Id.
8 at 269.

9 Here, petitioner focuses on the prosecutor of his case,
10 Bernard Garber, and alleges "it is entirely probable that the
11 facts testified to by Samuelson were provided to him by the
12 District Attorney" (pet. at 47:23-24), based on proof he has
13 allegedly uncovered in the district attorney's own files, and
14 also based on the declaration of an jail inmate who was allegedly
15 in a position to hear Morales confess and never heard petitioner
16 confess. Petitioner's allegations, when examined closely and
17 viewed in context, are entirely speculative and fall far short of
18 making it "entirely probable that the facts testified to by
19 Samuelson were provided to him by the District Attorney."

20 The easiest alleged factual basis of petitioner's claim to
21 deal with here involves the allegations of James Mahoney.
22 Mahoney's allegations amount to nothing more than the assertion
23 that Mahoney never heard Morales confess while he was in custody
24 for a short period of time near Morales in November 1982. If all
25 one knew about this allegation was the fact that Samuelson, in a
26 cell near Morales, heard Morales confess, and Mahoney, in a
27 different cell, did not hear him confess, such evidence would not

1 prove that Morales did not confess. Much less does it prove that
2 Morales did not confess and that the prosecutor fabricated the
3 confession and provided it to an inmate. These allegations are
4 entirely speculative¹⁴.

5 The second alleged factual basis of petitioner's claim is
6 even more speculative, based entirely on tortuous and gigantic
7 leaps of faith that simply do not follow from his alleged facts.
8 The proof begins and ends with two notations petitioner has found
9 in the district attorney's file for Bruce Samuelson's car theft
10 and forgery case. From these two notations, petitioner asks the
11 Court to find it "entirely probable" that Bernard Garber
12 fabricated petitioner's confession and gave it to Bruce
13 Samuelson.

14 Such paltry allegations are "not sufficient, for the petition
15 is expected to state facts that point to 'a real possibility of
16 constitutional error.'" O'Bremski v. Mass, 915 F.2d at 420;
17 Campbell v. Wood, 18 F.3d at 679. "To progress to an evidentiary
18 hearing, a habeas petitioner must do more than proffer gauzy
19 generalities or drop self-serving hints that a constitutional
20 violation lurks in the wings." David v. United States, 134 F.3d
21 at 478.

22

23 14. It is also comes from a person who concedes that he
24 is serving a sentence of life without the possibility of parole
25 in a murder case that he admits the prosecution had "two
26 jailhouse informants" to testify against him. Mahoney also
27 openly concedes that he was "suspicious" of Samuelson asking him
questions about his case. Mahoney is hardly an unbiased source
of information on this claim given that Samuelson notified the
San Joaquin District Attorney's Office that he had information
concerning Mahoney's case as well.

1 The sum total of petitioner's allegations stands and falls on
2 the strength of his assertion that Bernard Garber memorialized in
3 black ink Samuelson's waiver of the preliminary hearing a month
4 before it happened along with the terms of the plea agreement on
5 the case evaluation form "on or before" November 15, 1982, and
6 then turned over to Samuelson on November 15, 1982 the evaluation
7 form with its notation in blue ink that verified he had in fact
8 turned over the document, because any other inference suggests
9 that Garber would have engaged in the "unlikely and purposeless
10 action" of turning over to Samuelson on November 15, 1982 a blank
11 copy of the district attorney's evaluation form. This proof,
12 viewed against the record of Garber's subsequent request that
13 Samuelson undergo a polygraph examination, and petitioner's
14 suggested inference that Garber fabricated Samuelson's testimony
15 and provided it to him, is pure speculation, or more
16 appropriately, pure fantasy. The underlying allegations
17 concerning the notations in the district attorney's file and
18 James Mahoney's recollection of events while in custody, even if
19 assumed true, fail to "'point to the real possibility of
20 constitutional error.'" Blackledge v. Allison, 431 U.S. 63, 75
21 n. 7, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); O'Brenski v. Maas,
22 915 F.2d at 420. Indeed, they are so palpably incredible and
23 patently frivolous so as to warrant summary dismissal. Marrow v.
24 United States, 772 F.2d 525, 526 (9th Cir. 1985); see also, Wacht
25 v. Caldwell, 604 F.2d 1245, 1246-47 (9th Cir. 1979) (a legal
26 claim that a guilty plea was not made intelligently or
27 voluntarily is not established where the only factual allegation

1 made in support of the claim is that the judge who took the plea
2 failed to inform the defendant of his ineligibility for parole).

3 Petitioner's supplemental exhibits do nothing to improve
4 this showing. In fact, they hurt petitioner's claim for relief
5 because, assuming its truth, Mr. Samuelson would say today, as he
6 did fifteen years ago, that "[n]obody ever has [provided him with
7 any details of petitioner's case] except for" petitioner. Exh. 1
8 at 4.

9
10 **F. Claim 6. Improper Use Of Government Agent**

11 In petitioner's sixth claim for relief, (pet. at 55-58),
12 he alleges that the prosecutor "planted" witness Bruce Samuelson
13 "in a cell immediately adjacent to petitioner . . . for the
14 purpose of soliciting a confession from petitioner," (pet. at
15 55:21, 55:28 - 56:2), thereby denying petitioner his rights in
16 violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

17 In further support of this claim, petitioner realleges the
18 allegations contained in claims 4 and 5, (pet. at 56:3-4), and
19 further alleges that in an undated letter listing demands in
20 exchange for his testimony that Samuelson gave to Deputy District
21 Attorney Bernard Garber, Samuelson wrote "What I have to tell you
22 in regards to Morales will be quite a bit more than you
23 expected." (Pet. at 56:11-15 emphasis omitted.)

24 The warden has incorporated by reference into his answer
25 to claim 6 all of his responses contained in his answer to claims
26 4 and 5 above. The warden has both admitted and affirmatively
27 alleged the following facts as to claim 6. The warden has

1 admitted and affirmatively alleged that Bruce Samuelson wrote an
2 undated letter to Deputy District Attorney Bernard Garber that
3 listed favors Samuelson wanted in exchange for his testimony.
4 The warden further has admitted and affirmatively alleged that
5 this letter was admitted into evidence at petitioner's trial, and
6 that the letter's opening sentence states: "In exchange for my
7 testimony in the Morales case, which will guarantee a murder
8 conviction with special circumstances, I think the following is
9 a fair agreement:" The same letter's concluding sentence states:
10 "What I have to tell you in regards to Morales will be quite a
11 bit more than you expected." Except as admitted above, the
12 warden has specifically and generally denied all other
13 allegations in claim 6.

14 It is an elementary proposition under the Sixth Amendment
15 that once the right to counsel has attached through the
16 initiation of formal criminal charges, the police may not
17 interview the defendant concerning those charges through the use
18 of an agent. Maine v. Moulton, 474 U.S. 159, 171-73, 106 S. Ct.
19 477, 88 L. Ed. 2d 481 (1985).

20 Petitioner's allegations, even if they were assumed true,
21 fall far short of establishing a violation of this rule.
22 Petitioner's allegations do nothing more than build upon the
23 paltry showing he has made with respect to his 4th and 5th claims
24 for relief. For the reasons outlined in response to these two
25 earlier claims, petitioner has likewise failed to establish that
26 Bernard Garber "planted" Bruce Samuelson as an agent for law
27 enforcement to obtain incriminating statements from petitioner.

1 Nonetheless, petitioner has attempted to prop up these
2 allegations with nothing more than a piece of evidence that was
3 admitted into evidence at trial as an exhibit and does not
4 support the claim that Samuelson was "planted" by Bernard Garber
5 to elicit incriminating statements from petitioner after the
6 initiation of formal charges in this case.

7 This additional proof that petitioner relies upon is the
8 letter of Bruce Samuelson to Bernard Garber requesting a plea
9 bargain in exchange for his testimony that states in its
10 concluding sentence: "What I have to tell you in regards to
11 Morales will be quite a bit more than you expected " From this
12 single sentence in this letter, petitioner asks this Court to
13 draw the sinister inference that Mr. Garber "planted" Samuelson
14 in a jail cell near petitioner with the instructions for him to
15 elicit information about the circumstances of Terri Winchell's
16 murder from petitioner¹⁵. However, at the time of petitioner's
17 trial Mr. Samuelson testified that he was placed into protective
18 custody because, among other reasons, he was known in the jail as
19 a "snitch" and that inmates believed, (albeit wrongly so), that
20 he worked for the police. (RT at 2364-66.) The passage of
21 fifteen years has not helped petitioner any with respect to this
22

23 15. Petitioner does not explain how, on one hand, Mr.
24 Garber obtained incriminating statements from petitioner via
25 Samuelson, but on the other hand, provided Samuelson with the
26 entirety of his fabricated testimony. Maybe it is petitioner's
27 position that Garber fabricated Samuelson's testimony first and
 provided it to him, and then sent Samuelson into a cell near
 petitioner where Samuelson, by happenstance, was able to elicit
 from petitioner incriminating statements that were identical to
 the perjured testimony suborned by Garber.

1 claim and assuming the truth of the allegations in Exhibit 1, Mr.
2 Samuelson states now, consistent with his trial testimony, that
3 "[b]efore the trial or during the trial the insinuation was made
4 that I knew who Michael Morales was and that the District
5 Attorney set me up to go down, or the police, or the Sheriff's
6 Department, or whoever had set me up to go down, or to extract
7 information, not the case at all." (Exh. 1 at 13.)

8
9 **G. Claim 7. Ineffective Assistance Of Counsel Regarding**
10 **Informant Testimony**

11 In petitioner's seventh claim for relief (pet. at 58-63),
12 he alleges that his trial counsel failed to present facts to
13 impeach the "false" testimony of the prosecution's "star"
14 informant witness, and failed to request an instruction that the
15 testimony of a criminal informant should be viewed with distrust.
16 Pet. at 58:12-15.

17 Petitioner specifically alleges that trial counsel
18 failed to raise the fact that after Samuelson advised the
19 prosecution in writing that he was willing to testify against
20 petitioner that

21 the Deputy District Attorney entered into an agreement
22 that: (1) four of the six felony charges pending against
23 Samuelson would be dismissed, Samuelson would plead guilty
24 to the remaining two felony charges pending against
25 Samuelson, and Samuelson would receive a sentence of one
26 year in county jail; (2) one felony charge against
27 Samuelson already was dismissed by the prosecution prior

1 CONCLUSION

2
3 For the foregoing reasons, respondent respectfully submits
4 that petitioner's motion for an evidentiary hearing on 38 claims
5 should be denied and the warden's cross-motion for judgment on
6 the pleadings should be granted as to those same 38 claims
7 contained in the First Amended Petition for Writ of Habeas
8 Corpus.

9 Dated: April 28, 1998.

10 Respectfully submitted,


11 DANIEL E. LUNGREN
12 Attorney General of the State of
California

13 GEORGE WILLIAMSON
14 Chief Assistant Attorney General

15 CAROL WENDELIN POLLACK
Senior Assistant Attorney General

16 DONALD E. DE NICOLA
17 Supervising Deputy Attorney General

18 DAVID F. GLASSMAN
Deputy Attorney General

19 
20 KEITH H. BORJON
21 Supervising Deputy Attorney General

22 Attorneys for Respondent
23
24
25
26

27 KHB:js
LA91XW0002

1 MCBREEN & SENIOR
2 1801 Century Park East
3 26th Floor
4 Los Angeles, California 90067
5 Telephone: (310) 552-5300

6 Attorneys for Petitioner
7 MICHAEL ANGELO MORALES
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 MICHAEL ANGELO MORALES,)	CASE NO. CV 91-0682 DT
)	
13)	MOTION FOR PARTIAL SUMMARY
14 Petitioner,)	JUDGMENT OF PETITIONER
)	MICHAEL MORALES
15 v.)	
)	
16 ARTHUR CALDERON, as)	
17 Warden of San Quentin)	DATE: No Hearing Per Order
18 State Prison,)	Dated June 29, 1998
)	
19 Respondent.)	
<hr/>		

20
21 PLEASE TAKE NOTICE THAT pursuant to the order of the
22 Honorable Dickran Tevrizian dated June 29, 1998, petitioner
23 Michael Morales (hereinafter "petitioner") hereby moves the court
24 for partial summary judgment with respect to claims 1-15, 17, 24-
25 30, 33, 37, 38, 41, 42, 50, and 55 in the first amended petition
26 for writ of habeas corpus.
27
28

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Telephone: (310) 552-5300

1 This motion is made pursuant to Rule 56 of the Federal
2 Rules of Civil Procedure and is based on this motion, the court's
3 order dated June 29, 1998, and the parties' stipulation in court
4 on June 29, 1998 that there are no material issues of disputed
5 fact with respect to these claims in: (1) the First Amended
6 Petition for Writ of Habeas Corpus and the Exhibits attached
7 thereto; (2) the exhibits attached to petitioner's motion for an
8 evidentiary hearing; and (3) petitioner's opposition to
9 respondent's motion for judgment on the pleadings, and the
10 exhibits attached thereto.
11

12 Pursuant to the stipulation of the parties at the June
13 29, 1998 hearing, and the court's order thereon, this motion for
14 partial summary judgment is submitted without further briefing by
15 the parties, and without further oral argument at a hearing on
16 this motion.
17
18
19

20 DATED: July 8, 1998

MCBREEN & SENIOR

21
22
23 By: 

DAVID A. SENIOR

EMILIE D. JUDD

Attorneys for Petitioner

MICHAEL ANGELO MORALES
24
25
26
27
28

PETITIONER IS ENTITLED TO PARTIAL SUMMARY

JUDGMENT AS A MATTER OF LAW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, petitioner moves this court for partial summary judgment seeking the issuance of a writ with respect to claims 1-15, 17, 24-30, 33, 37, 38, 41, 42, 50, and 55 in the first amended petition for writ of habeas corpus. "Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law." Sega Enters. Ltd. v. Maphia, 948 F. Supp. 923, 931 (N.D. Cal. 1996) (citing Fed. R. Civ. P. 56)). The moving party's burden is "discharged by showing--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "If the party moving for summary judgment meets its initial burden of identifying for the Court the portions of materials on file which it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on mere allegations in the pleadings in order to preclude summary

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1 judgment." Seg. Enters. Ltd., 948 F. Supp. at 931 (citing T.W.
2 Elec. Serv., Inc. v. Pacific Elec. Contractors Assn., 809 F.2d
3 626, 630 (9th Cir. 1987)).

4 Inasmuch as there are no material issues of fact with
5 respect to the verified allegations in the petition, the exhibits
6 attached thereto, the exhibits attached to petitioner's motion
7 for an evidentiary hearing, and/or the admissible evidence and
8 exhibits attached to petitioner's opposition to respondent's
9 motion for judgment on the pleadings, petitioner is entitled to
10 judgment on the claims set forth below as a matter of law.^{1/}

11 Petitioner hereafter identifies the claims, and the
12 facts and evidence in support thereof, wherein partial summary
13 judgment should be granted in his favor:

14 **Claims 1 through 3:** Discriminatory Charging Practices at 16;
15 Arbitrary Charging Practices at 22; and IAC re Failure to
16 Challenge Unconstitutional, Discriminatory Charging Practices at
17 28.^{2/}

23 ¹
24 The legal standards and briefing by the parties with respect
25 to the claims and issues addressed in this motion for partial
26 summary judgment are set forth in respondent's motion for
27 judgment on the pleadings, and petitioner's opposition thereto,
and stands submitted in accordance with this court's June 29,
1998 order.

28 ²
See Exhibit "3" (attached to motion for evidentiary
hearing): Arbitrariness, Capriciousness, and Discrimination in
San Joaquin County Capital Prosecution, 1977-1986, Dr. Richard
Berk, February 1996.

1 **Claims 4 through 7: Failure to Disclose Material Evidence**

2 (Samuelson) at 31; Knowing Use of False Testimony by Prosecution
3 (Samuelson) at 44; Improper Use of Government Agent at 55; IAC re
4 Informant Testimony at 58.^{3/}

6 **Claims 8 through 12: IAC at Guilt Phase re PCP Use at 63; IAC at**
7 **Penalty Phase re PCP Use at 73; IAC at Guilt Phase re Alcohol**
8 **Intoxication at 74; IAC at Penalty Phase re Alcohol Intoxication**
9 **at 79; IAC at Guilt and Penalty Phase re Concurrent Effects of**
10 **PCP Use and Alcohol Intoxication at 80.^{4/}**

12 **Claims 13 through 15: Failure to Disclose Material Evidence**
13 (Lawrence) at 83; Knowing Use of False Testimony by Prosecution
14
15
16

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3

18 See Exhibits "A" through "J", and "K" through "S" (attached
19 to petition); **Exhibit "1"**: Interview of Bruce Samuelson by
20 Attorney General, August 4, 1993; **Exhibit "4"**: District Attorney
21 Polygraph Report re Bruce Samuelson, February 10, 1983; **Exhibit**
22 **"5"**: Polygraph Test re Bruce Samuelson, February 8, 1983; **Exhibit**
23 **"6"**: Report of Francis M. Connolly, Certified Polygraph Examiner,
24 January 24, 1994, re Polygraph Test on Bruce Samuelson; **Exhibit**
25 **"7"**: Declaration of Frank Moppins, August 5, 1994; **Exhibit "8"**:
26 Declaration of Michael C. Estrada, June 2, 1994; and **Exhibit "9"**:
27 Declaration of Ruben Serna, May 19, 1994 (attached to motion for
evidentiary hearing); **Exhibit "A"**: Declaration of Lisa Flynn;
Exhibit "B": Declaration of John Morales; **Exhibit "C"**:
Declaration of Josie Morales; and **Exhibit "D"**: Declaration of
Leonard Lucero (attached to petitioner's opposition to motion for
judgment on the pleadings).

28
4

See Exhibits "T" through "V" (attached to petition); and
Exhibit "2": Declaration of Ferris N. Pitts, Jr., M.D. (attached
to motion for evidentiary hearing).

(Lawrence) at 85; IAC at Guilt Phase re Pathologist Testimony

(Lawrence) at 90.^{5/}

Claim 24: IAC at Guilt Phase re Lying-in-Wait Murder Theory and Special Circumstance at 114.^{6/}

Claims 25 and 26: Under-representation of Hispanics on the Jury Venire at 119; IAC at Guilt Phase and Penalty Phase Resulting from Improper Challenge of Under-representation of Hispanics on the Jury Venire at 121.^{7/}

Claim 33: IAC at the Guilt Phase for Failure to Raise Alibi at 147.^{8/}

Claim 41: Knowing Use of False Testimony by Prosecution (Cardenas) at 189.^{9/}

Claims 17, 27-30, 37, 38, 42, 50, 55: IAC at the Guilt Phase re Torture Special Circumstance at 95; IAC at Guilt Phase and Penalty Phase Resulting from Improper Voir Dire at 124; IAC at Penalty Phase re Mental Health Evaluation at 130; IAC at Penalty

⁵

See Exhibit "W" (attached to petition).

⁶

See Exhibits "X", "Y", and "Z" (attached to petition).

⁷

See Exhibit "13": Declaration of Jennifer V. Ball, February 12, 1993 (attached to motion for evidentiary hearing).

⁸

See Exhibit "AA" (attached to petition).

⁹

See Exhibit "11": Declaration of Raquel Cardenas, April 8, 1994 (attached to motion for evidentiary hearing).

1 Phase re Suicide Prevention at 133; IAC at Penalty Phase re Use
2 of Mental Health Expert at 135; IAC at Guilt Phase During
3 Closing Argument (Improper Conduct) at 175; IAC at the Guilt
4 Phase and Penalty Phase During Closing Argument (Failure to
5 Address Evidence) at 178; IAC re Testimony of Flores and
6 Cardenas at 193; IAC at the Penalty Phase re Evidence of Other
7 Crimes at 208; IAC re Prosecutor's Prejudicial Remarks re Lack
8 of Remorse at 218.
9
10
11

12 CONCLUSION
13

14 For the foregoing reasons, petitioner Michael Morales
15 respectfully requests that the court grant this motion for
16 partial summary judgment in all respects.
17
18

19 DATED: July 8, 1998

MCBREEN & SENIOR

20
21 By: 

22 DAVID A. SENIOR

23 EMILIE D. JUDD

24 Attorneys for Petitioner

25 MICHAEL ANGELO MOFALES
26
27
28

PROOF OF SERVICE

Morales v. Calderon
Case No. CV 91-0682 DT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1801 Century Park East, 26th Floor, Los Angeles, California 90067.

On July 7, 1998, I served the foregoing document (s) described as MOTION FOR PARTIAL SUMMARY JUDGMENT OF PETITIONER MICHAEL MORALES on the interested parties in this action by placing
[] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

Keith H. Borjon, Esq.
Supervising Deputy Attorney General
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

[X] (By Mail): As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing in affidavit.

[] (By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee above.

[] (State): I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

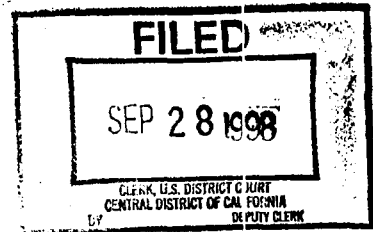
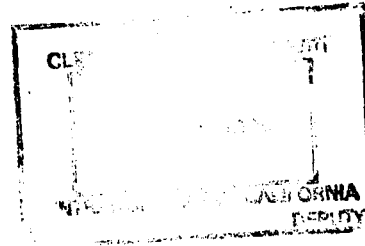
[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 7, 1998, at Los Angeles, California.


CYNTHIA KELLEY

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DEATH PENALTY



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES,

Petitioner,

v.

ARTHUR CALDERON, Warden of
California State Prison at
San Quentin,

Respondent.

CASE NO. CV 91-0682-DT

DEATH PENALTY CASE

ORDER GRANTING RESPONDENT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
PETITIONER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

Overview

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

Petitioner Michael Angelo Morales was convicted by a jury of the first degree murder of Terri Winchell. The jury found that Morales intentionally killed the victim while lying in wait and that the murder involved the infliction of torture. After a penalty phase trial, Morales was sentenced to death. His conviction and sentence were affirmed by the California Supreme Court.

Morales has filed a petition for writ of habeas corpus in this Court, asserting that his conviction and sentence were obtained in violation of the United States Constitution. The

petition presents fifty-nine separate claims for relief. Currently pending before the Court are the parties' cross-motions for partial summary judgment on thirty-nine of these claims. These thirty-nine claims include all twenty-six of petitioner's ineffective assistance of counsel claims,¹ all ten of petitioner's claims that the prosecution either presented false testimony or failed to disclose material exculpatory evidence,² two claims of trial court error,³ and a claim that the jury venire from which petitioner's petit jury was drawn was not composed of a fair cross-section of the community in which petitioner was tried.⁴

Background

1. Factual Summary

The State charged that in 1981, Morales and his cousin, Ricky Ortega, decided to kill Terri Winchell, a girl who had begun dating Ortega's sometime boyfriend, Randy Blythe. Ortega was motivated by anger at Winchell for dating Blythe and for disclosing to others that Ortega was gay. Morales was motivated by a desire to help his cousin. At the time, Ortega was 19, Morales was 21, and Winchell was 17.

On January 8, 1981, Ortega invited Winchell to accompany him on a shopping trip. He then called Morales to say that he and

¹ Claims 3, 7, 8, 9, 10, 11, 12, 15, 17, 19, 24, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 42, 50, 55, and 59 of the First Amended Petition.

² Claims 1, 2, 4, 5, 6, 13, 14, 39, 40, and 41 of the First Amended Petition.

³ Claims 46 and 47 of the First Amended Petition.

⁴ Claim 25 of the First Amended Petition.

1 Winchell were coming over to pick him up. Morales armed himself
2 with a belt, a knife, and a hammer, telling his girlfriend Raquel
3 Cardenas that he was going to do Ortega a favor and hurt a girl
4 by strangling her with the belt. With Winchell in the passenger
5 seat of his car, Ortega drove to the apartment where Morales was
6 living at the time. Morales climbed into the back seat of the
7 car and sat behind Winchell. After Ortega had driven out of town
8 to a more isolated location, Morales reached over the seat and
9 tried to strangle Winchell with the belt. The belt broke,
10 however, so Morales began beating her on the head with the hammer
11 until she was unconscious or dead. Morales then dragged Winchell
12 out of the car into a field, raped her, and stabbed her four
13 times in the chest. Morales rejoined Ortega, who had remained in
14 the car, and they drove back to town to clean the tools and the
15 car. The two men returned the belt, the knife, and the hammer to
16 the apartment where Morales was living, and the items were
17 subsequently discovered there by the police. People v. Morales,
18 48 Cal. 3d 527, 257 Cal. Rptr. 64 (1989); (10 R.T. 1994-2022⁵; 12
19 R.T. 2543-65.).

20 2. State Proceedings

21 Morales and Ortega were jointly charged with the murder of
22 Terri Winchell, but their cases were severed prior to trial.
23 Morales was charged in the San Joaquin County Superior Court with
24

25 ⁵ The first two-thirds of Volume 10 of the Reporter's Transcript
26 (covering the proceedings for Tuesday, March 24, 1983) bears two
27 sets of page numbers. The type-written page numbers (running
28 from 1774 through 1962) appear to be in error, and apparently
were corrected by adding a second set of Bates-stamped page
numbers (running from 1974 through 2162). Although the petition
cites the type-written page numbers, this order cites the
corrected Bates-stamped page numbers.

1 first degree murder, Cal. Penal Code § 187, conspiracy to commit
2 murder, Cal. Penal Code § 182, and forcible rape, Cal. Penal Code
3 § 261.2. Two special circumstances, each of which independently
4 rendered Morales eligible for the death penalty, were charged:
5 (1) intentional killing while lying in wait, Cal. Penal Code
6 § 190.2(a)(15); and (2) intentional murder involving the
7 infliction of torture, Cal. Penal Code § 190.2(a)(18).

8 Morales was represented by Craig M. Holmes, an attorney in
9 private practice. Because of pretrial publicity, the case was
10 transferred to Ventura County for trial. Jury selection
11 commenced before Judge Charles R. McGrath of the Ventura County
12 Superior Court on March 8, 1983.

13 A. Guilt Phase

14 The guilt phase of the trial lasted about two weeks. The
15 state's case was based in large part on the testimony of friends
16 and acquaintances of Ortega and Morales, who described the
17 defendants' activities and incriminating statements around the
18 time of the crimes, and on the testimony of a jailhouse
19 informant, who recited Morales's description of events as
20 allegedly conveyed to him while the two were in jail together.
21 In addition, there were items of physical evidence, such as blood
22 stains and footprints, which were consistent with the events
23 described by these witnesses, although they did not establish the
24 identity of the killer. Terri Winchell's purse, a broken belt, a
25 hammer, and three knives were recovered from the apartment in
26 which Morales was living. The testimony of the principal
27 witnesses is summarized below, in approximately the order in
28 which it was presented at trial.

1 Christine Salaices's Testimony

2 Christine Salaices was Rick Ortega's girlfriend and also a
3 friend of Terri Winchell's. She testified that around March
4 1980, Ricky⁶ told her he wanted to be with Randy Blythe sexually.
5 (9 R.T. 1903-1907.) In August 1980, about four months before the
6 murder, Ricky told her that he planned to kill Randy Blythe and
7 Terri Winchell, and that "his cousin Mikey would be with him
8 because Mikey wouldn't let him stop. Mikey would help him . . .
9 ." (9 R.T. 1909-10.) Mikey was going to help Ricky because
10 Ricky "couldn't do it by himself . . . ," since he "was too
11 chicken." (9 R.T. 1934.)

12 Glenda Chavez's Testimony

13 Glenda Chavez, a friend of Terri Winchell's, testified that
14 approximately two weeks before the murder, Rick Ortega told her
15 that Terri "was gonna pay back for everything she was saying
16 about him, for going around saying that he was gay." (8 R.T.
17 1709-10.) The next week, however, Rick called and "told me to
18 tell Terri that everything was okay, that he wanted to be friends
19 with her and that he was gonna come over sometime and talk with
20 her." (8 R.T. 1715.)

21 Chavez was with Terri Winchell on Thursday, January 8, 1991,
22 the day of the murder. At approximately 5:30 p.m., Terri
23 received a call from Rick Ortega. Terri told Chavez that Rick had
24 said that he wanted to take her to the mall to help him select a
25 gift for his girlfriend. (8 R.T. 1698-1702.)

26 /////

27

28 ⁶ For consistency with the witnesses' testimony, this order
frequently refers to people by their first names.

1 Police and Expert Testimony

2 Sergeant Edward Williams of the Stockton police department
3 testified about the trail of blood leading from the road into the
4 field where Winchell's body was found. Two indentations the size
5 of a person's knee were on each side of the thigh and hip area of
6 her body. Slightly behind these indentations were small holes in
7 the ground that could have been made by the toes of a pair of
8 shoes. (8 R.T. 1768-71.)

9 Sergeant Williams searched Rick Ortega's house and recovered
10 a pair of trousers and a pair of shoes. The shoes, which were in
11 the bathroom, were damp. There was also water under Ortega's
12 car, which was parked outside, and on the tires, although the car
13 was otherwise dirty. (8 R.T. 1759-63.)

14 Dr. Robert Lawrence, the pathologist who conducted the
15 autopsy, described the multiple severe head wounds (mostly on the
16 back and the right side of the head) and four stab wounds to the
17 victim's chest. Winchell might have survived up to ten minutes
18 after infliction of the head wounds, and she was probably alive
19 at the time of at least three of the stab wounds. Any of three
20 knives recovered from the apartment where Morales was staying
21 could have caused the stab wounds. The hammer found in the
22 apartment could have caused the head wounds. (9 R.T. 1780-1802.)
23 On cross-examination, Dr. Lawrence admitted that the physical
24 evidence was compatible with several different scenarios, and
25 agreed that it did not demonstrate that any of the knives found
26 in Morales's apartment was actually used to stab the victim.
27 Moreover, it was impossible to know how the wounds were
28 inflicted, or the respective order of the wounds and the

1 abrasions from being dragged across the field. Winchell was
2 probably killed by the blows to her head, there were no signs of
3 any trauma to the neck or pelvic region, and the amount of blood
4 in various parts of the body was consistent with the knife wounds
5 having been inflicted after death. (9 R.T. 1802-47.)

6 Criminalists described the search of Rick Ortega's
7 automobile. A hat, apparently with blood on it, was in the
8 trunk. Apparent small bloodstains were in various other parts of
9 the car. (See, e.g., 9 R.T. 1853-1867; 1937-40.) The car also
10 smelled "like Windex or something like that, like some kind of
11 cleaner had been used." (9 R.T. 1938-39.)

12 Sergeant Robert Ross of the Stockton police department
13 described a search of the apartment where Morales was living
14 (Patricia Flores's apartment) that was conducted on Saturday, two
15 days after the murder. A hammer was discovered in the vegetable
16 crisper compartment of the refrigerator. Various items of
17 clothing, including a pair of shoes and a jacket, were recovered.
18 Three different knives were seized. A wet towel smelling of
19 ammonia or some type of detergent was found. Terri Winchell's
20 purse was discovered in a bedroom closet. Two pieces of a broken
21 belt were found under a mattress in another bedroom. (8 R.T.
22 1710; 9 R.T. 1953-61; 10 R.T. 1974-83.)

23 A fingerprint expert, Samuel Erwin, testified that he
24 compared prints taken from Rick Ortega's car with prints of Terri
25 Winchell, Rick Ortega, Mike Morales, Patricia Flores, and Raquel
26 Cardenas. He was able to identify two prints found in the car as
27 Rick Ortega's, but was unable to identify any other prints. He
28 also tried to obtain prints from Terri Winchell's purse and

1 shoes, but was unable to find any. He explained that some
2 surfaces do not retain prints well. (10 R.T. 2027-2035.) On
3 cross-examination, Erwin testified that a palm impression found
4 on the passenger door was not made by any of the people for whom
5 he had fingerprint samples (i.e., Terri, Rick, Mike, Pat, or
6 Raquel). (10 R.T. 2039-42.)

7 Kenneth Penner, a criminalist, testified about his analysis
8 of samples of bodily fluids and tissues. Winchell, Ortega, and
9 Morales all had type O blood; Randy Blythe's blood was type A.
10 Morales's blood and Ortega's blood were "basically
11 indistinguishable" from each other, but their blood was
12 distinguishable from Winchell's and from Blythe's.' (10 R.T.
13 2127-34.) Sperm cells were present in the sample recovered from
14 Winchell's vagina. However, Penner was unable to isolate any
15 blood group factors in the vaginal swab that could be positively
16 attributed to anybody other than Winchell herself. (10 R.T.
17 2120-22.) Based on the vaginal swab, it was possible to conclude
18 only that the sperm did not come from Randy Blythe. The absence
19 of Morales's PGM factor from the vaginal swab concerned Penner,
20 but it was not inconsistent with Morales being the source of the
21 sperm, since various events can mask the identifying factors.
22 (10 R.T. 2135-37.)

23 Penner testified that the blood on the broken belt was of
24 the same type as Winchell's. He was unable to type the minute
25 quantity of blood found on the hammer. (10 R.T. 2137-39.)

26
27 ⁷ Penner testified that Blythe's blood type was Group A, PGM type
28 1-1, esterase-D type 2-1, with an unknown PGM subtype; Winchell's
was Group O, PGM type 1-1, PGM subtype 1+1+, esterase-D type 2-1;
and Morales's and Ortega's were both Group O, PGM type 2-1, PGM
subtype 2+1+, esterase-D type 1-1.

1 Winchell's blood type⁸ is found in 2.8 percent of the population.
2 (10 R.T. 2148-50.) The blood found on the floor mats of Ortega's
3 car, and in some of the samples taken from his car, was of PGM
4 type 1-1, consistent with Winchell but not with Morales or
5 Ortega. Other samples from the car were inconclusive. (10 R.T.
6 2139-42.) Rick Ortega's pants had blood that was consistent with
7 Winchell's but inconsistent with Morales's or Ortega's. (10 R.T.
8 2143.) Several of the clothes recovered from Morales's house,
9 and the shoes, had blood that was not Terri Winchell's, but
10 Penner could conclude nothing more about the source of those
11 bloodstains.⁹ (10 R.T. 2143-48.)

12 Penner also testified about the footprints found near the
13 body. He concluded with respect to some of them that Morales's
14 shoes were "a possible source," but Ortega's shoes were not.
15 However, other impressions were consistent with both sets of
16 shoes. (10 R.T. 2157-61.) On cross-examination, Holmes
17 reinforced the inconclusive nature of Penner's conclusions. (See
18 10 R.T. 2166-89 (bodily fluids and hair samples); 10 R.T. 2192-
19 2202 (shoeprints).) He also emphasized the fact that no blood
20 was found on Morales's jacket, or on any of the three knives
21 recovered from Morales's residence. (10 R.T. 2189-90.)

22 Randy Blythe's Testimony

23 Randy Blythe testified that he began dating Terri Winchell
24

25 ⁸ I.e., Group O, PGM type 1-1, PGM subtype 1+1+, esterase-D type
26 2-1.

27 ⁹ There was testimony that Morales cut his finger late Friday
28 night (the night after the murder), and was bleeding profusely.
(See, e.g., 10 R.T. 2093-94, 2109-10 (testimony of Raquel
Cardenas).)

1 in 1980, and that he last had sex with her about a week before
2 she was killed. He had also been involved in a sexual
3 relationship with Rick Ortega since before he met Terri. On the
4 day of the murder, Rick called him about 7:30 p.m. to say that he
5 was coming over. Rick came over about an hour later in his car;
6 the two drove off and had sex in the car. Randy noticed that the
7 car smelled of ammonia. (10 R.T. 1994-2003.)

8 Raquel Cardenas's Testimony

9 Raquel Cardenas (Morales's 16-year-old girlfriend) testified
10 that on January 8, 1981, the day of the murder, she and Mike were
11 alone at Pat Flores's apartment when, at approximately 4:30 in
12 the afternoon, the phone rang. Mike talked on the phone, and
13 afterwards, told Cardenas that it was Rick Ortega, and that Rick
14 was going to pick up a girl and come over. Mike said that he was
15 going to do Rick a favor, that "he was gonna hurt this girl,"
16 that "he was gonna strangle her" with his belt. (10 R.T. 2050-
17 53.) Rick arrived, and drank a bottle of wine with Mike. They
18 left around 6:30 p.m., and returned an hour later. Mike had a
19 purse and the belt with him, and appeared to have blood on his
20 hands. He told Cardenas that the belt broke, and showed her
21 Terri Winchell's high school identification card. He also told
22 her to look at Rick's car, which was parked outside. Cardenas
23 saw a spot of blood on the car door. Rick was running water in
24 the kitchen sink. Mike then told Cardenas that he tried to
25 strangle the girl with the belt, but it broke, so he hit her over
26 the head with a hammer. Mike said that the girl screamed for
27 Rick to help her. After she passed out, Mike dragged the girl
28 out of the car and left her in the field. (10 R.T. 2054-60.)

1 Cardenas also testified that Mike's drinking appeared to have
2 affected him "a little," and that he was "relaxed," but that
3 "it's hard to tell when Mike's drunk." (10 R.T. 2063.)

4 Cardenas testified that the police arrested her two days
5 later. She initially refused to talk to them because she was
6 scared, but later told them everything she knew. She was
7 arrested and charged as an accessory, but was given immunity from
8 prosecution in exchange for her testimony. (10 R.T. 2069-70.)

9 On cross-examination, Holmes asked Cardenas about prior
10 inconsistent statements she had made. (10 R.T. 2079-81, 2094-
11 98.) Cardenas also admitted that she never saw the defendants
12 remove the knife or hammer from the house, or return them. (10
13 R.T. 2086, 2091.) She was with Pat Flores during the hour that
14 the defendants were away, and contrary to Flores's subsequent
15 testimony (10 R.T. 2209-10), Flores never appeared to notice that
16 the hammer or knife were missing. (10 R.T. 2087-88.) Holmes
17 also asked about Morales's drug use; Cardenas testified that for
18 the seven or eight months that she had known Morales, he smoked
19 PCP somewhat frequently. (10 R.T. 2089-90.)

20 Holmes questioned Cardenas about her interactions with the
21 police (who told her that they thought Morales had raped the
22 victim, and that they believed she "knew something" about the
23 crime), her exposure to newspaper accounts of the crime prior to
24 her full statement to the police (from which she could have
25 learned factual details), and the offer of immunity from
26 prosecution, release from juvenile hall, entry into a witness
27 program, including payment of her rent, leading up to her
28 decision to give the police a second and different account of

1 what she knew. (10 R.T. 2098-2106.)

2 Patricia Flores's Testimony

3 Patricia Flores (a.k.a. Pat Santiago) resided with her
4 children in the apartment in Stockton where Morales was living at
5 the time of the crime. She testified that when she arrived home
6 at around 5:00 p.m. on January 8, 1981, Mike Morales and Raquel
7 Cardenas were there. Rick Ortega came by somewhat later. She
8 accompanied Rick to a store, they bought a bottle of Thunderbird
9 wine, and returned to the house. Mike and Rick later drove off
10 in Rick's car. While they were gone, Flores noticed that her
11 hammer was missing, because she wanted to straighten out a
12 picture on the wall, so she got up to look for the hammer. She
13 also noticed that a kitchen knife was missing. When the two men
14 returned about an hour later, Mike had a broken belt in his hand.
15 He ran some water in the kitchen and went outside. Flores saw
16 that there was blood in Rick's car. (10 R.T. 2207-11.)

17 Morales later told Flores that "he had put a belt around
18 someone's neck and then that it broke and then he . . . hit her
19 with the hammer and then . . . they took her into . . . a field .
20 . . and he drug her out of the car and then he . . . said that he
21 stabbed her and then he said that he 'fucked her.'" Flores saw
22 the hammer and the knife on the kitchen counter and noticed that
23 they were wet. The knife had a chip in it that she had not seen
24 before. Flores also testified that the day before the murder,
25 Morales came up behind her while she was seated and threw a belt
26 around her neck, tightening it "a little bit." She took it off
27 and asked him what he was doing. Morales responded that "he was
28 practicing." (10 R.T. 2211-13.)

1 On cross-examination, Flores clarified that before Morales
2 left the house with Rick Ortega, he drank a bottle of Thunderbird
3 wine. (10 R.T. 2230.) She also admitted that the chip in the
4 knife had been caused by a bone when she was cutting into a piece
5 of meat, before the events in question, so she had been mistaken
6 when she testified that she hadn't seen the chip before the day
7 of the murder. (10 R.T. 2235-36.) She did not see either
8 defendant with the hammer or the knife on the night of the
9 murder. (10 R.T. 2234-36.) Morales described the events to her
10 later in the evening, after having consumed another bottle of
11 wine. His speech was slurred, and she was falling asleep on the
12 couch at the time. (10 R.T. 2254-56.)

13 As for the incident in which Morales allegedly "practiced"
14 on Flores with the belt, Morales frequently joked and played with
15 Flores and her children. (10 R.T. 2258-59.) Asked whether
16 Morales's statement regarding the crime might also have been a
17 joke to see what kind of reaction Flores might have, Flores said
18 she didn't know what Morales was trying to do. (10 R.T. 2280-
19 82.) Holmes also questioned Flores about her prior statements to
20 investigators (in which she failed to mention the events she
21 testified about in court) and about the assistance provided to
22 her by the police and the district attorney in preparing her
23 current testimony. (10 R.T. 2219-23, 2256, 2265-67; 11 R.T.
24 2284-86). Holmes questioned Flores about her motives for
25 testifying against Morales, implying that she had feared
26 prosecution if she did not cooperate with the police. (11 R.T.
27 2294-2301.)

28 /////

1 Bruce Samuelson's Testimony

2 Bruce Samuelson met Morales while they were both in
3 protective custody in the maximum security section of the San
4 Joaquin County Jail in November 1982. They were in cells
5 opposite each other, approximately four and a half feet apart.
6 Samuelson testified that over the course of about two weeks,
7 Morales recounted the facts of the crime to him, generally in
8 accordance with the testimony of Raquel Cardenas and Pat Flores,
9 with certain additional details. Samuelson also testified that
10 Morales asked him about the possibility of eliminating Cardenas
11 and Flores as witnesses. (11 R.T. 2330-42.)

12 Samuelson stated that in exchange for his testimony, the
13 district attorney's office had promised to "recommend a one-year
14 county jail sentence with a felony conviction" for Samuelson's
15 pending charges of vehicle theft, two counts of forgery, and two
16 counts of receiving stolen property. This would allow Samuelson
17 to avoid going to state prison. (11 R.T. 2332-33, 2341.)

18 Holmes cross-examined Samuelson on whether he had learned of
19 the crime from the extensive media coverage or heard about it in
20 jail. (11 R.T. 2343-45.) He explored the crimes that had landed
21 Samuelson in jail, and Samuelson admitted that without the
22 promise of a recommendation from the district attorney's office,
23 he might face thirteen years in state prison. (11 R.T. 2346-54.)
24 Samuelson saw the piles of transcripts and police reports that
25 were in Morales's cell, but he did not see Ortega's files and had
26 very little contact with Ortega (who was also in the jail). He
27 read only one page from Morales's papers. (11 R.T. 2354-58.)
28 Samuelson knew that Greg Winchell, the victim's brother, was also

1 in the San Joaquin County Jail, but he never talked to him or
2 obtained any information about the crime from him. (11 R.T.
3 2362.)

4 Holmes established that Samuelson was in protective custody
5 because other inmates thought he was a police officer, or at
6 least an informant. (11 R.T. 2363-67.) Because Samuelson wanted
7 to avoid going to prison, he wrote the prosecutor a letter saying
8 that he could guarantee a murder conviction with special
9 circumstances, and that in exchange he wanted various benefits.
10 (11 R.T. 2367-73.)

11 Defense Case

12 The defense case consumed half a day of trial. (2 C.T. 537-
13 38.) Holmes did not present an opening statement, and Morales
14 did not testify. Holmes called the following three witnesses:

15 Charles Morton, a forensic scientist, testified about the
16 shoe print evidence. He explained that although there were many
17 photographs in evidence, they were photographs of a total of five
18 separate impressions in the soil. (11 R.T. 2478-83.) He
19 compared these impressions to the three sets of shoes introduced
20 into evidence by the prosecution: a pair of brown shoes
21 recovered from Ricky Ortega's residence, a pair of black shoes
22 recovered from Morales's residence, and Terri Winchell's shoes.
23 He opined that it was impossible to conclude anything about the
24 source of two of the footprint impressions. Two other
25 impressions might have been made by Morales's shoes (as well as
26 by many other shoes), but they could not have been made by
27 Ortega's shoes. Finally, one of the impressions might have been
28 made by Ortega's shoes, but it could not have been made by

1 Morales's shoes. (11 R.T. 2483-89.) It would have been
2 preferable to take plaster casts of the shoeprint impressions at
3 the time of the initial investigation. (11 R.T. 2490-94.)

4 Ruth Kalua, a friend of Patricia Flores, testified that she
5 never saw a family portrait on the wall of Flores's apartment,
6 contrary to Flores's testimony, (10 R.T. 2239), that she had
7 noticed the hammer missing when she decided to hammer in a
8 "family portrait" that was hanging on her wall. (11 R.T. 2511-
9 12.) Kalua also testified that on the day of the murder, after
10 taking Flores to visit her boyfriend, she drove Flores straight
11 home, without stopping at a photography studio, and dropped her
12 off at her home around 4:00 p.m. (11 R.T. 2514-17.) This was
13 contrary to Flores's testimony that after visiting her boyfriend,
14 she accompanied Kalua to a photography studio and waited for her
15 for about two hours while Kalua had pictures taken, causing her
16 to arrive home around 5:00 p.m. (10 R.T. 2223-27.) It was also
17 inconsistent with Raquel Cardenas's testimony that at 4:30 p.m.
18 on the day of the murder, she and Morales were alone together in
19 Pat Flores's apartment when Rick Ortega telephoned to say that he
20 was coming over with a girl, and that Flores did not come home
21 until around 5:30 p.m. (10 R.T. 2050-53.)

22 Finally, in an effort to rebut the testimony of the
23 jailhouse informant (Bruce Samuelson), a private investigator
24 testified that he visited the section of the jail in which
25 Samuelson and Morales were housed together. He described the
26 construction and layout of the cells (across from each other,
27 with steel doors and small portholes at eye level). (11 R.T.
28 2533-35.) Although it was not explicitly stated, the import of

1 this testimony was that it would have been difficult for the two
2 to communicate from their separate cells. Holmes also introduced
3 records of Samuelson's prior crimes. (11 R.T. 2536.)

4 Holmes's closing argument argued reasonable doubt, focusing
5 on the absence of conclusive physical evidence, and on the
6 inconsistencies between the major witnesses' testimony and their
7 motives to misremember or misrepresent the facts in order to help
8 the prosecution and extract themselves from their own legal
9 difficulties. (12 R.T. 2581-2633.) He conceded that Terri
10 Winchell was in Rick Ortega's car and that "she was struck in the
11 car." "Her blood was in that car." (12 R.T. 2634.) Holmes also
12 told the jury, "I think it's clear that Mr. Morales was involved
13 to the extent that he was assisting Ricky when he returned in
14 terms of bringing these things in." (12 R.T. 2649.) However, he
15 argued that even if Morales was in the car, there was
16 insufficient evidence to prove beyond a reasonable doubt that he
17 possessed the requisite mental state to be guilty of torture or
18 murder. (12 R.T. 2629-49.)

19 Verdict

20 On April 7, 1983, after deliberating for about one and a
21 half days, and requesting a read-back of Dr. Lawrence's testimony
22 concerning the victim's injuries, the jury returned a verdict.
23 The jury found Morales guilty of first degree murder, and found
24 both special circumstance allegations (lying in wait and torture)
25 to be true. The jury expressly found that the killing was
26 wilful, deliberate and premeditated, that the victim was aware of
27 extreme physical pain inflicted by Morales, and that he
28 personally used two deadly weapons (a knife and a hammer) in

1 committing the offense. The jury also found Morales guilty of
2 rape and conspiracy to commit murder. (2 C.T. 541; 3 C.T. 680-
3 82.)

4 B. Penalty Phase

5 The penalty phase commenced on April 19, 1983. The
6 prosecution case was brief. A witness testified that Morales
7 together with two other men robbed his convenience store about
8 two months before the murder. Morales grabbed and held the store
9 owner during the robbery. One of his cohorts knocked down the
10 store owner's wife, who was eight months pregnant. (13 R.T.
11 2748-70.) A docket showing that Morales was found guilty of two
12 counts of robbery was introduced. (13 R.T. 2772-73, 2778.) The
13 jury also heard a stipulation that Morales pled guilty to second
14 degree burglary in 1979. A docket reflecting his conviction on
15 this charge was introduced. (13 R.T. 2777-78.)

16 The defense portion of the penalty phase consumed
17 approximately two court days. It commenced with testimony by
18 eleven friends, acquaintances, and family members. The import of
19 this evidence was that Morales had been a generally well-behaved
20 child until approximately the age of 16, when he began to
21 associate with Mexican-Americans who dressed in gang-style
22 clothing. (See, e.g., 13 R.T. 2855-57 (father's testimony).) He
23 experienced some difficulties as a minority youth growing up in a
24 predominantly white area, especially as his complexion was darker
25 than many, even within his own family, and he was self-conscious
26 about this. (See, e.g., 13 R.T. 1926-27 (sister's testimony).)
27 When he was approximately one and a half years old, his mother
28 left the house for a period of six to ten months, and he was left

1 in the care of his father, who was working very hard and had
2 little time to care for Michael. (13 R.T. 2873-81; 14 R.T.
3 3011.) This period of time was very difficult for Michael,
4 although he did not consciously remember it. His father was
5 well-intentioned, but he was overworked, emotionally distant, and
6 a strict disciplinarian. (13 R.T. 2873-81 (uncle's testimony); 13
7 R.T. 2921-24 (sister's testimony).)

8 Morales's family disapproved of his changed style of dress
9 and associations with people whom they considered undesirable.
10 He started running away from home. They attempted to impose a
11 curfew on him, but he refused to abide by their rules.
12 Eventually, at around the age of 16, he was placed in a group
13 home for delinquent children. (13 R.T. 2966-71 (mother's
14 testimony); 13 R.T. 2807-19 (testimony of group home director).)
15 He behaved reasonably well, and was sent home after about seven
16 months. However, he continued to clash with his parents over his
17 lifestyle, and they asked him to leave home around the age of 17
18 or 18. (13 R.T. 2854-57; 2971-72.)

19 Morales had performed well in school, especially in art, at
20 which he was very skilled, until around the age of 16, when he
21 started drinking and associating with a "bad crowd." (13 R.T.
22 2783-87 (testimony of high school dean); 13 R.T. 2829 (testimony
23 of friend).) He fathered three children, but did not marry or
24 work to support his children. (13 R.T. 2860-63, 2866-67.)
25 Nevertheless, he loved children and children loved him. (See
26 e.g., 13 R.T. 2887-90.) The mother of his daughter testified
27 that he loved his daughter. (13 R.T. 2901-2905.) However, she
28 did not marry him because "he used to spend too much time with

1 his friends and he used to be going out and he used to take
2 drugs," especially PCP. (13 R.T. 2906.)

3 Various friends and family members testified that they would
4 continue to provide emotional support to Morales if he lived the
5 rest of his life in prison, and that in the two years since he
6 was incarcerated after his arrest and thereby removed from the
7 influence of drugs, he appeared to have changed for the better.
8 They testified that Morales believed that even in prison, there
9 was a purpose to his life and he could be a responsible human
10 being, possibly by selling his artwork and thereby providing
11 money for his children. (See, e.g., 13 R.T. 2951-55 (sister's
12 testimony).)

13 Finally, Dr. Linda Carson, a psychologist, testified that
14 although Morales was not psychotic, he suffered from a neurosis
15 termed "avoidant personality disorder," which was probably
16 originally induced by the trauma of the childhood abandonment by
17 his mother. Among other things, this made Morales so
18 hypersensitive to criticism and rejection that he avoided close
19 contact with other people. (14 R.T. 3003.) Dr. Carson also
20 testified about the changes in Morales's life that started around
21 age 16, when he "got heavily involved in drug abuse,"
22 particularly PCP, which he "abused on a very heavy and chronic
23 basis for a number of years." He also abused marijuana. (14
24 R.T. 3022-23.) Dr. Carson testified that Morales's protective
25 attitude toward his younger cousin Ricky caused him extreme
26 emotional duress when Ricky said that Terri Winchell was telling
27 people that Ricky was gay and asked Morales to help stop her.
28 (14 R.T. 3036-37.)

1 On Friday, April 22, 1983, the jury was instructed and began
2 deliberating. The jury was released over the weekend, and
3 resumed deliberations Monday morning. A verdict of death was
4 returned that afternoon, April 25, 1983.

5 C. Appeal

6 On June 1, 1989, the California Supreme Court affirmed
7 Morales's conviction and death sentence in their entirety.
8 People v. Morales, 48 Cal. 3d 527, 257 Cal. Rptr. 64 (1989). The
9 United States Supreme Court denied Morales's petition for
10 certiorari on November 27, 1989. Morales v. California, 493 U.S.
11 984 (1989).

12 3. Federal Proceedings

13 Morales commenced proceedings in this court by filing a
14 request for appointment of counsel on February 6, 1991. A
15 petition for writ of habeas corpus containing 52 claims for
16 relief was filed on July 20, 1992. On November 16, 1992, the
17 Court dismissed 32 of these claims for lack of exhaustion.
18 Morales presented these claims to the California Supreme Court in
19 a state habeas petition, which was denied on July 28, 1993.

20 On January 14, 1994, Morales filed a First Amended Petition
21 in this Court, presenting 59 claims for relief: 20 exhausted
22 claims from the original petition, 37 newly-exhausted claims, and
23 two additional claims attacking the constitutionality of
24 California's death penalty statute (Claims 31 and 32). On April
25 22, 1994, the Court dismissed the 37 newly-exhausted claims, as
26 well as Claims 31 and 32, on the ground that they were
27 procedurally barred. On June 4, 1996, the Ninth Circuit
28 announced its opinion reversing this Court's dismissal of these

1 claims.¹⁰ The circuit held that California's habeas corpus
2 timeliness standards were not consistently enforced at the time
3 that Morales filed his first state habeas petition, so his
4 procedural default was not based on an adequate state ground
5 barring federal habeas review. Morales v. Calderon, 85 F.3d 1387
6 (9th Cir.), cert. denied, 117 S. Ct. 500 (1996).

7 On June 16, 1994, petitioner moved for partial summary
8 judgment on Claim 26 of the original petition (Claim 18 of the
9 First Amended Petition), alleging constitutional error in the
10 trial court's instructions concerning the torture special
11 circumstance. The Court denied this motion on July 18, 1994.

12 On March 13, 1997, the Attorney General filed an answer to
13 the First Amended Petition.

14 On February 19, 1998, petitioner moved for an evidentiary
15 hearing on 39 of his claims. Petitioner also requested leave to
16 conduct discovery with respect to certain claims. Respondent
17 filed an opposition to the evidentiary hearing motion and a
18 motion for judgment on the pleadings on all but one of the claims
19 (Claim 50) as to which petitioner sought an evidentiary hearing.
20 Respondent also opposed petitioner's request for discovery and in
21 the alternative requested leave to conduct its own discovery.

22 At a hearing on June 29, 1998, the Court denied petitioner's
23 motion for an evidentiary hearing. The parties' cross-motions
24 for discovery were denied as moot. Respondent's motion for
25 judgment on the pleadings was deemed to be a summary judgment
26 motion (including as to Claim 50), and petitioner was instructed

27
28 ¹⁰ Morales did not appeal the dismissal of Claims 31 and 32, so
those claims are no longer pending before this Court. See
Morales v. Calderon, 85 F.3d at 1389 n.5.

1 to file a cross-motion for summary judgment on those claims on
2 which he asserts he is entitled to judgment as a matter of law.

3 On July 8, 1998, petitioner filed a cross-motion for summary
4 judgment on 30 of the claims encompassed within his earlier
5 motion for an evidentiary hearing and respondent's motion for
6 judgment on the pleadings. Accordingly, now before the Court are
7 the parties' cross-motions for partial summary judgment on the
8 following 30 claims: Claims 1-15, 17, 24-30, 33, 37, 38, 41, 42,
9 50, and 55 of the First Amended Petition. Respondent also moves
10 for summary judgment on Claims 19, 34, 35, 36, 39, 40, 46, 47,
11 and 59, but petitioner does not include these claims within the
12 scope his cross-motion. The Court informed the parties that they
13 did not need to submit further briefing in support of their
14 arguments for summary judgment on these 39 claims, and took the
15 cross-motions under submission on the basis of the extensive
16 briefing already submitted in this case.

17 In the course of considering the claims subject to the
18 pending motions, the Court has also concluded that Claim 18,
19 alleging instructional error with respect to the torture-murder
20 special circumstance, should be resolved on the merits without
21 further briefing, based on the reasons given in the Court's order
22 of July 18, 1994, which denied petitioner's motion for partial
23 summary judgment on this claim.

24 Discussion

25 1. Claim 1

26 Morales is a Hispanic male who was twenty-one years old when
27 he was charged with murder; his victim was a white female. He
28 alleges that the decision of the San Joaquin County District

1 properly have been denied by the trial court. See Lockhart v.
2 Fretwell, 506 U.S. 364, 372 (1993); Baumann v. United States, 692
3 F.2d 565, 572 (9th Cir. 1982) ("The failure to raise a meritless
4 legal argument does not constitute ineffective assistance of
5 counsel."). Claim 3 therefore fails, for the same reasons that
6 Claims 1 and 2 fail.

7 4. Claim 4

8 Claim 4 alleges that the prosecutor failed to disclose
9 material benefits conferred on the jailhouse informant, Bruce
10 Samuelson, in exchange for his testimony, in violation of the
11 prosecutor's obligations to disclose exculpatory evidence to the
12 defense before trial. See United States v. Agurs, 427 U.S. 97
13 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

14 Specifically, petitioner alleges that in exchange for his
15 testimony, Samuelson received the following benefits from the
16 prosecutor: (1) dismissal of four out of six pending felony
17 charges; (2) a promise that Samuelson would be sentenced to only
18 a year in the county jail for the remaining two felony charges;
19 (3) reinstatement of probation on a felony burglary probation
20 violation. However, when asked on the stand by the prosecutor
21 whether he had been offered anything in exchange for agreeing to
22 testify, Samuelson said only, "It was stated that they would
23 recommend a one-year county jail sentence with a felony
24 conviction," instead of state prison. (11 R.T. 2341-42.) On
25 cross-examination, Holmes asked, "you have in fact been given a
26 promise by the prosecution, have you not?," to which Samuelson
27 replied, "for a recommendation." (11 R.T. 2371-72.)

28 Morales alleges that this testimony was false, because in

1 fact, the prosecutor had personally assured Samuelson that in
2 exchange for his testimony, four of his six pending felony
3 charges would be dismissed, and the prosecutor had already
4 recommended and obtained the court's position on the two
5 remaining felony charges (i.e., that Samuelson could serve his
6 time in county jail instead of state prison). Except for stating
7 that there was a promise to recommend one year of jail time, the
8 prosecutor did not disclose the other benefits conferred on
9 Samuelson. (Pet. at 31-44.)

10 Respondent admits that there was a plea agreement between
11 the district attorney and Samuelson in exchange for Samuelson's
12 testimony against Morales, and that pursuant to that agreement,
13 the district attorney agreed to dismiss four of the six pending
14 felony charges and recommend that Samuelson receive felony
15 probation and jail time of no more than one year. However,
16 respondent contends that Samuelson's testimony that there was
17 only a recommendation, not a promise, of a one-year sentence, was
18 truthful, because under California law, the prosecution has no
19 power to guarantee a criminal defendant any particular
20 disposition of criminal charges as part of a plea agreement;
21 instead, the plea disposition must be approved by a judge.
22 (Answer at 52-54.)

23 In a criminal prosecution, the state must "disclose evidence
24 favorable to the accused that, if suppressed, would deprive the
25 defendant of a fair trial." United States v. Bagley, 473 U.S.
26 667, 675 (1985). This includes an obligation to disclose
27 impeachment evidence. Id. at 676. However, the failure to
28 disclose evidence tending to impeach a prosecution witness is

1 constitutional error only if the evidence is material, i.e., "if
2 there is a reasonable probability that, had the evidence been
3 disclosed to the defense, the result of the proceeding would have
4 been different." Kyles v. Whitley, 514 U.S. 419, 433-34
5 (citation and internal quotation marks omitted). "A 'reasonable
6 probability' of a different result is . . . shown when the
7 government's evidentiary suppression 'undermines confidence in
8 the outcome of the trial.'" Id. at 434 (quoting Bagley, 473 U.S.
9 at 678).

10 In assessing the materiality of the allegedly suppressed
11 impeachment evidence, the question is whether it is reasonably
12 likely that the jury would have concluded that there was
13 reasonable doubt that Morales was guilty of murdering Terri
14 Winchell, if the jury had known that in addition to the promise
15 of a recommendation for a one-year jail sentence, Samuelson
16 expected that in exchange for his testimony, four pending felony
17 charges would be dropped and his probation reinstated.
18 At trial, Samuelson was extensively cross-examined by
19 petitioner's counsel, who brought out his criminal history and
20 his motives for offering testimony against Morales. The jury was
21 aware that Samuelson was a career criminal who faced serious
22 criminal charges and who had been promised lenient treatment in
23 exchange for testifying against Morales. The jury knew that
24 Samuelson faced little jail time, if he testified as the
25 prosecution expected. In view of what the jury knew, the
26 allegedly suppressed information concerning the number of felony
27 charges and the reinstatement of probation could have had no
28 effect on the jury's assessment of Samuelson's credibility, and

1 hence no effect on the outcome of the trial. There was thus no
2 suppression of material exculpatory evidence.

3 5. Claim 5

4 Morales alleges that the prosecutor, Bernard Garber,
5 knowingly allowed Samuelson to present perjured testimony, in
6 violation of Napue v. Illinois, 360 U.S. 264 (1959). In support
7 of this claim, Morales points to the following four items of
8 evidence: (1) At trial, Samuelson testified that Morales began
9 telling him about the crime around November 15, 1982, and
10 continued discussing it for approximately two weeks. (11 R.T.
11 2340.) (2) The district attorney's file on Samuelson contains a
12 form labeled "EVALUATION" on which Garber made an entry
13 indicating that Samuelson's preliminary hearing was waived and
14 that Samuelson was to plead to two counts in exchange for local
15 incarceration. The note also says, "See BG re details
16 ([defendant] is to testify in Peo v. Morales - 187 w/ specials,
17 [defendant] to remain in custody) BG." (underlining in original).
18 This entry is undated, but on the bottom of the form there
19 appears a stamp that reads, "Receipt of a copy of this document
20 is hereby acknowledged," followed by the handwritten notation,
21 "to [defendant] BG 11/15." (Pet. at 46-47 & Ex. E.) (3)
22 Samuelson had an opportunity to learn about the crime from
23 accounts published in local newspapers. (Pet. at 47-50.) (4)
24 Another prisoner incarcerated near Morales and Samuelson around
25 the time of Morales's alleged confession to Samuelson would
26 testify that although Morales on occasion asked Samuelson
27 questions about the meanings of medical or legal terms, Morales
28 never discussed the facts surrounding the allegations against him

1 with Samuelson, or with anyone else. (Pet. at 51-54.)

2 Petitioner reasons that Garber must have written the note on the
3 "evaluation" form on or before November 15, 1982, and that this
4 demonstrates that Garber gave assurances to Samuelson in exchange
5 for his testimony, before Samuelson obtained the purported
6 incriminating statements from Morales. Therefore, petitioner
7 concludes, Garber must have known that Samuelson would fabricate
8 his testimony. (Pet. at 45-47.)

9 Respondent does not dispute the authenticity of these
10 individual items of evidence, but submits that considered in
11 context, they amount to nothing more than speculation that the
12 prosecutor engaged in improper behavior. Respondent also points
13 out that on February 7, 1983, Garber requested a polygraph
14 examination of Samuelson, to determine his veracity when he
15 stated that Morales told him about killing Terri Winchell. The
16 examination was conducted, and the polygraph examiner reported
17 his opinion that Samuelson's statements were truthful. (Answer
18 at 75.)

19 The evidence adduced by petitioner is insufficient to
20 support an inference that the prosecution knowingly presented
21 false testimony. The testimony of the other inmate housed near
22 Morales and Samuelson, even if true in its entirety, shows only
23 that the inmate did not hear a confession, not that a confession
24 did not occur. The evidence concerning newspaper reports, viewed
25 in the light most favorable to petitioner, would only establish
26 opportunity, not actual fabrication. Moreover, these evidentiary
27 items do nothing to show that the prosecutor knew that
28 Samuelson's testimony was false. Petitioner's claim, therefore,

1 rests entirely on speculation about notes contained in the
2 district attorney's file for Bruce Samuelson's car theft and
3 forgery case. This evidence, viewed against the record of
4 Garber's subsequent request that Samuelson undergo a polygraph
5 examination, is simply insufficient, "for the petition is
6 expected to state facts that point to 'a real possibility of
7 constitutional error.'" O'Bremski v. Maass, 915 F.2d 418, 420
8 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75
9 n.7 (1977)). Accordingly, respondent is entitled to summary
10 judgment on Claim 5.

11 6. Claim 6

12 Claim 6 alleges that the prosecutor deliberately had
13 Samuelson placed in a cell near Morales so that Samuelson could
14 obtain a confession from Morales, and that in doing this, the
15 prosecutor was effectively using Samuelson as a government agent,
16 in violation of Massiah v. United States, 377 U.S. 201 (1964) and
17 Maine v. Moulton, 474 U.S. 159 (1985). In support of this claim,
18 petitioner points to the allegations offered in support of Claims
19 4 and 5, and the following two additional allegations: (1)
20 Samuelson was placed in the cell near Morales even though he was
21 neither a disciplinary problem nor a person charged with a
22 violent crime; and (2) On an unknown date, Samuelson wrote
23 assistant district attorney Garber a letter saying, "What I have
24 to tell you in regards to Morales will be quite a bit more than
25 you expected." Morales contends that this letter shows that
26 Samuelson knew that Garber was "expecting" something from him in
27 regard to Morales. (Pet. at 55-58 & Ex. S.)

28 The evidence proffered by Morales in support of this claim

1 is entirely speculative, and fails to establish that the
2 prosecutor deliberately placed Samuelson in an adjacent cell in
3 order to obtain incriminating statements from Morales. Cf.
4 Harris v. Vasquez, 913 F.2d 606, 629 (9th Cir. 1990) (petitioner
5 failed to present a "sufficient evidentiary basis to require a
6 hearing on whether [the informant] was a government agent.").
7 Respondent is therefore entitled to summary judgment on this
8 claim.

9 7. Claim 7

10 Claim 7 alleges that petitioner's trial counsel was
11 ineffective for failing to discover certain benefits conferred on
12 Samuelson by the prosecutor (as described in Claim 4), and for
13 failing to gather available evidence that would have shown that
14 Morales did not confess to Samuelson. (Pet. at 58-63.)

15 Petitioner's claim that counsel was ineffective for failing
16 to discover the full extent of the benefits conferred on
17 Samuelson in exchange for his testimony fails for the same reason
18 that Claim 4 fails. This is because the reasonable probability
19 of a different outcome standard applicable to Brady claims also
20 applies to claims of ineffective assistance of counsel. See
21 Kyles, 514 U.S. at 434; Strickland, 466 U.S. at 694. In view of
22 what the jury knew about Samuelson's expectation of lenient
23 treatment and his motives for testifying against Morales, any
24 failure to disclose the alleged additional benefits would not
25 have affected the jury's assessment of Samuelson's credibility,
26 and hence would not have affected the outcome of the trial.
27 Thus, even if petitioner's trial counsel was deficient for
28 failing to discover the additional impeachment information,

1 robbery (although they would know the underlying facts of the
2 crime) (Claim 50), and they would have been reminded not to draw
3 any adverse inference from Morales's failure to take the stand
4 (Claim 55). These insubstantial differences are not enough to
5 undermine confidence in the outcome of petitioner's trial. See
6 Strickland, 466 U.S. at 694. In sum, in trying and sentencing
7 Michael Morales for the murder of Terri Winchell, the State of
8 California afforded him that which he was due under the United
9 States Constitution: a fair trial with "the Assistance of
10 Counsel for his defense." U.S. Const. amend. VI.

11 **Conclusion**

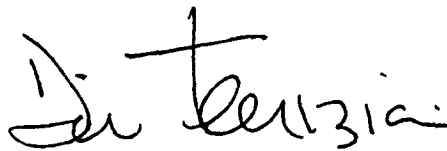
12 For the foregoing reasons, the Court hereby **GRANTS**
13 respondent's motion for partial summary judgment and **DENIES**
14 petitioner's motion for partial summary judgment. Claims 1, 2,
15 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 24, 25,
16 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46,
17 47, 50, 55, and 59 of the First Amended Petition are hereby
18 **DENIED**.

19 Petitioner's remaining claims to be decided by this Court
20 are: 16, 20, 21, 22, 23, 43, 44, 45, 48, 49, 51, 52, 53, 54, 56,
21 57 and 58.

22 Counsel for respondent to prepare a Proposed Partial Summary
23 Judgment consistent with this Order.

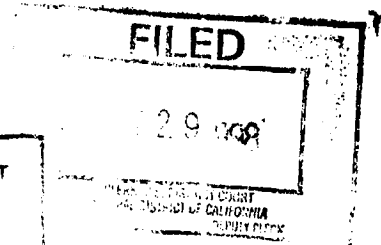
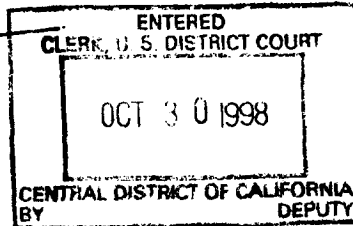
24 IT IS SO ORDERED.

25
26 Dated: 9-28-98



DICKRAN TEVRIZIAN
United States District Judge

98 OCT 21 AM 10:31
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES
BY: _____



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10	MICHAEL ANGELO MORALES,)	NO. CV 91-0682-DT
11	Petitioner,)	
12	v.)	DEATH PENALTY
13	ARTHUR CALDERON, Warden,)	[PROPOSED] PARTIAL SUMMARY
14	California State Prison)	JUDGMENT ORDER RE CLAIMS 1-15,
15	at San Quentin)	17-19, 24-30, 33-42, 46-47, 50,
16	Respondent.)	55, AND 59 OF FIRST AMENDED
17)	PETITION FOR WRIT OF HABEAS
)	CORPUS

18 Currently before the Court is petitioner's First Amended
19 Petition For Writ of Habeas Corpus, which contains 59 individual
20 claims for relief. In accordance with the Court's order filed
21 September 28, 1998 regarding the parties' cross-motions for summary
22 judgment, the Court hereby **DENIES** Petitioner partial summary
23 judgment on claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14,
24 15, 17, 18, 24, 25, 26, 27, 28, 29, 30, 33, 37, 38, 41, 42, 50, and
25 55. The Court hereby **GRANTS** Respondent partial summary judgment on
26 claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19,
27 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42,

1 46, 47, 50, 55, and 59. In accordance with these summary judgment
2 rulings, claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15,
3 17, 18, 19, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39,
4 40, 41, 42, 46, 47, 50, 55, and 59 of the First Amended Petition
5 For Writ of Habeas Copus are hereby **DENIED**.

6 IT IS SO ORDERED.

7 Dated: OCT 29 1998

DICKRAN TEVRIZIAN

8
9 Dickran Tevrizian
United States District Judge

10 Presented by: Keith H. Borjon
11 Keith H. Borjon
12 Supervising Deputy Attorney General
13 Attorney for Respondent
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEATH PENALTY

MICHAEL ANGELO MORALES,

Petitioner,

v.

ARTHUR CALDERON, as
Warden of San Quentin State Prison,

Respondent.

) CASE NO. CV 91-0682 DT
)
) NOTICE OF MOTION AND MOTION
) TO ALTER AND/OR AMEND
) JUDGMENT; MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) SUPPORT THEREOF
)
) DATE: June 14, 1999
) TIME: 10:00 a.m.
) PLACE: Courtroom of the Hon.
) Dickran Tevrizian
)

PLEASE TAKE NOTICE THAT on June 14, 1999, at 10:00 a.m., or as soon
thereafter as counsel may be heard, in the courtroom of the Honorable Dickran Tevrizian located
at 255 E. Temple Street, Los Angeles, California, petitioner Michael Angelo Morales (hereinafter
"petitioner") will move the court pursuant to Rule 59 of the Federal Rules of Civil Procedure to
alter and/or amend the judgment entered on April 21, 1999 with respect to Claims 4 through 7

MCBREEN & SENIOR
1925 Century Park East, Suite 2200
Los Angeles, California 90067
Telephone: (310) 552-5300

1 in the first amended petition for writ of habeas corpus, and grant relief with respect to these
2 claims.

3
4 This motion will be based on the Notice of Motion and Motion, the accompanying
5 Memorandum of Points and Authorities, the First Amended Petition for Writ of Habeas Corpus,
6 all pleadings and papers on file in this action, and upon such other matters as may be presented to
7 the court at the time of the hearing.
8

9
10 DATED: May 5, 1999

MCBREEN & SENIOR

11
12 By: 

13 DAVID A. SENIOR
14 EMILIE D. JUDD
15 Attorneys for Petitioner
16 MICHAEL ANGELO MORALES
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1 "A motion to alter or amend the judgment shall be served no later than 10 days
2 after entry of the judgment." Fed. R. Civ. P. 59(e). The final judgment in favor of respondent
3 was entered on April 21, 1999. In this regard, petitioner's motion to alter and/or amend the
4 judgment, filed within ten days of entry of judgment, is timely. *See also* Fed. R. Civ. P. 6.
5

6
7 **1. REPRESENTATIVES OF THE STATE FAILED TO DISCLOSE NUMEROUS
8 FAVORABLE, MATERIAL, IMPEACHING FACTS TO PETITIONER.**

9 Petitioner respectfully submits that this court must alter the judgment with respect
10 to Claims 4 through 7 in the first amended petition for writ of habeas corpus and find that the
11 representatives of the State of California, and in particular those in charge of law enforcement in
12 San Joaquin County during the 1980s, failed to disclose to petitioner the numerous favorable,
13 material, impeaching facts pertaining to the prosecution's illegal use of snitch jail house witness
14 Bruce Samuelson, as now further evidenced by the newly discovered facts reflecting the habitual,
15 repeated, and improper systemic use of snitch jail house witnesses and informants in San Joaquin
16 County during the 1980s in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth
17 Amendment rights under the U.S. Constitution.
18

19 **A. Bruce Samuelson's False Testimony (Claims 4-7).**

20 Bruce Samuelson was a snitch jail house informant witness; "a career criminal
21 who faced serious criminal charges and who had been promised lenient treatment in exchange for
22 testifying against [petitioner]." Order, October 5, 1998 at 31. His testimony was not cumulative
23 of other evidence, but provided "certain additional details" to the evidence presented by the
24 prosecution. Order, October 5, 1998 at 14. Samuelson's testimony, however, was wholly
25 fabricated. He lied when he testified that he obtained a confession from petitioner, and that
26 petitioner purportedly confessed to: (1) the murder; and (2) the rape. Without this false
27 testimony, a conviction on the rape charge could not have been obtained, the special
28 circumstances could not have been found true, and the first degree murder charge would have

1 been in doubt. Samuelson's false testimony that petitioner confessed to the murder, and that,
2 after inflicting the fatal wounds, he boasted two years later that he didn't want to "wast[e] a good
3 piece of . . . ass . . . [and] that he [] bone[d] it" (RT 2338), was false, inculpatory, inflammatory,
4 prejudicial, and unsupported by any other evidence. This false and wholly uncorroborated
5 testimony, *in and of itself*, mandated the verdicts returned by the jury.

6 The trial judge found Samuelson to be credible and honest. Order, April 19, 1999
7 at 13 (quoting trial judge at 14 RT 1391-92). This belief by the trial court was erroneous - the
8 judge simply was played the fool by the district attorney and by Samuelson, duped by the
9 specious lies, just as were the jurors. In fact, absent Samuelson's false testimony, "the physical
10 evidence on its own was insufficient to prove [petitioner] murdered Terri Winchell." Order,
11 October 5, 1998 at 68. The judgment in this case is repeatedly predicated upon the fabricated
12 "evidence" provided by Samuelson, thereby rendering it manifestly unjust and clearly
13 erroneous.^{1/}

14
15 Petitioner now presents newly discovered evidence that during the 1980s, the San
16 Joaquin County District Attorney's Office had an uncontrolled pattern and practice of regularly
17 providing post-testimonial undisclosed favors to snitch jail house witnesses and informants in
18 exchange for false testimony. This evidence further supports the evidence previously presented
19 in support of Claims 4 through 7 in first amended petition for writ of habeas corpus.

20
21 **B. From At Least 1977 Through 1989, The LADA, LASD And LACJ**
22 **Conducted An Informant System Which Gave LACJ Informants Compelling**
23 **Motives To Fabricate Confessions.**

24 A 1989-1990 Los Angeles County Grand Jury prepared a report accurately
25 describing how the informant system worked in Los Angeles from 1977 through 1988. The

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27 ¹

28 *See, e.g.,* Order, October 5, 1998 at 50; Order, October 19, 1998 at 16; Order, November
17, 1998 at 8; Order, December 23, 1998 at 8.

1 Grand Jury Report, entitled: "Investigation of the Involvement of Jail House Informants in the
2 Criminal Justice System in Los Angeles County" ("Report")² documented an elaborate informant
3 system that was created by the LASD, LADA and LACJ³ to solicit and encourage inmate
4 fabrication of confessions from high-profile defendants, particularly in close cases or when a
5 retrial was pending after a hung jury. That system gave law enforcement "deniability" of such
6 matters and precluded any chance of defense discovery.
7

8 While petitioner's case originated in San Joaquin County, not Los Angeles
9 County, the same techniques and even the same snitch personnel were used in both locations,
10 plying their trade in both counties and mentoring, counseling, and educating other inmates and
11 law enforcement officials in the practice. For purposes of a factual backdrop, petitioner will set
12 forth a brief description of the style, manner and method employed in Los Angeles County to
13 provide perspective and comparative facts of the same system employed in San Joaquin County
14 during the same period.
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19 This Report is a writing authorized by law to be recorded or filed and in fact is recorded
20 and filed in a public office, and it includes matters observed pursuant to duty imposed by law to
21 which matters there was a duty to report. Fed. R. Evid. 803(8), 901(b)(7). The California
22 Supreme Court has taken judicial notice of the Report. *See People v. Gonzalez*, 51 Cal. 3d 1179,
23 1259 n.54 (1990). This much publicized Report is readily attainable, and respondent is in
24 possession of a copy of same. Petitioner can have a copy produced to the court, if needed, and
25 hereby requests that the court take judicial notice of the Report.

26 ³
27 Various law enforcement entities are described by the following abbreviations: LACJ =
28 Los Angeles County Jail; LASD = Los Angeles Sheriff's Department; LADA = Los Angeles
District Attorney's Office; JILT = LADA's Jailhouse Informant Litigation Team; LAPD = Los
Angeles Police Department; LACC = Los Angeles County Counsel's Office; SJCJ = San
Joaquin County Jail; SJSD = San Joaquin Sheriff's Department; SJDA = San Joaquin District
Attorney's Office; CDC = California Department of Corrections; SSU = CDC's Special Services
Unit; BPT = Board of Prison Terms.

1 The Report found that informants believed the "system" (prosecutors and law
2 enforcement) actively solicited their testimony and encouraged fabrication.⁴ The Report also
3 recounted numerous claims by informants that law enforcement forced them to become
4 informants in the first place, by feeding them "inside" crime information to form the basis for a
5 fabricated confession (Report at 22-24) or by placing them in informant tanks or taking other
6 steps which would brand them as "snitches" in the eyes of other inmates. *Id.* at 20-21. The
7 Report stated that informants believed they were on a mission from law enforcement to acquire
8 or create confessions. *Id.* at 25-27.

11 The Report stated that the methods used by informants to acquire information
12 about other inmates' alleged crimes were "numerous" and included: using media accounts of
13 crime (i.e., *newspaper articles* - see Claim 5); receiving arrest reports or case files from law
14 enforcement; engaging in suggestive questioning with law enforcement; impersonating law
15 enforcement officers over the telephone to obtain information from other officers or law
16

18 ⁴
19 "The informants' perception of their role is significant to the evolution and
20 continuation of the informant system in Los Angeles County. Whether true or
21 not, many informants believe that law enforcement officials have directly or
22 indirectly solicited them to actively conduct themselves to secure incriminating
statements from other defendants. Some informants claim that various law
enforcement officials supply informants with information about crimes, in order
that they (the informants) may fabricate a defendant's confession.

23 In exchange . . . , the informants expect significant benefits from the government.
24 *Based on this expectation, informants supply information favorable to the
prosecution, often irrespective of its truth.*

25 *Informants' claims concerning the pervasiveness of perjury and falsifications*
26 *reflects a belief, at least among some informants, that this is how informants ply*
27 *their trade. The belief that this is how the informant game is played can only*
28 *encourage other informants to follow suit."*

1 enforcement sources, such as coroners or computers; receiving information from their own
2 friends or relatives; reading transcripts from a targeted defendant's hearings; receiving
3 knowledge from other informants; and receiving general information from a defendant and
4 turning it into a false confession. *Id.* at 27-31.
5

6
7 In sum, *informants* profess, and indeed *have demonstrated*, the
8 *astonishing ability to discover information about crime in order to*
9 *concoct a confession by another inmate*. Their incarceration does
10 not prevent them from accessing information on other defendant's
11 cases. [Sic.] Indeed, their familiarity with the criminal justice
12 system permits them to fully exploit information held by its
13 various components.

14 *Id.* at 31(emphasis added).⁵
15

16 One defense attorney described a "secret society" of informants, prosecutors and
17 law enforcement all working together. He recounted calling an informant to testify:

18 5

19 The report also described step-by-step informant Leslie White's 1988 demonstration of
20 obtaining "unique details" for confession fabrication through his impersonation of law
21 enforcement over the telephone. *Id.* at 69-71. The Report then further noted that the LASD
22 changed procedures to prevent such tactics from working again, but that, three months later, *the*
23 *same informant*:

24 *conducted a similar demonstration in a hotel room for a television*
25 *crew from the program 60 Minutes*. The informant was given the
26 name of a defendant whose arrest and arraignment for a homicide
27 were reported in a local newspaper. Posing as a Deputy Sheriff, a
28 Deputy District Attorney, and a Los Angeles Police Department
detective, the informant called various agencies, including the
Sheriff's information bureau and the coroner. He was able to learn
the cause of death, the date of the shooting, the age and race of the
victim, and that there were multiple gunshot wounds to both of the
victim's thighs.

Id. at 72-73.

1 about the "informant system" in the jail. *He described . . . the*
2 *unwritten understanding between prosecutors and informants as*
3 *to the benefits to be derived from their testimony.* The attorney
4 likened this to a "secret society" where even though nothing is
5 said, the prosecutors and the informants know that some benefit
6 will flow to the informant for his testimony. [¶] The defense
attorney explained it was extremely difficult to try to impeach jail
house informants when there was nothing in the record relating to
benefits they were to receive from their testimony.

7 *Id.* at 38-39 (emphasis added).

8
9 In considering the role of prosecutors, the Report painted the collective LADA's
10 office as a flock of ostriches in a criminal justice desert, heads stuck in the sand, to avoid seeing
11 law enforcement officers and informants engaged in the above-described activities. The Report
12 held that *prosecutors expended ". . . very little effort . . ." to investigate informants' background*
13 *or motivation, except to ask other prosecutors how the informants performed in other cases, i.e.,*
14 *did the testimony result in convictions.* *Id.* at 74. The report held that the:

15
16 *institutionalization of the benefit system is confirmed by the*
17 *testimony of Deputy District Attorneys in their responses to written*
18 *inquiries from their own office and from Special Counsel. The*
19 *benefits informants receive are varied. . . . [but include] . . .*
20 *dismissal of charges, imposition of a lesser sentence, or reduction*
21 *of a sentence already imposed. [¶] . . . [¶] . . . It is the lack of*
22 *proper controls and supervision concerning these benefits and the*
23 *inadequate disclosures of the benefits or expected benefits which*
24 *have raised grave concerns regarding these practices.*

25 The difficulties are apparent in two specific areas: . . . [¶] . . . 2.
26 *The entire circumstances regarding benefits and the expectations*
27 *of benefits, in many cases, are not adequately presented to the*
28 *judge or jury for them to have the necessary factual basis to*
evaluate the testimony of the informant. This is particularly so
when no agreement on the extent of benefits is made with the
informant until after the testimony.

Id. at 75-76 (emphasis added).

1 A reason for the existence of unspoken deals, based on implications or
2 assumptions by the informant, law enforcement and prosecutor, is that such an amorphous
3 "understanding" leaves nothing discoverable by a defendant, to use in impeaching an informant's
4 motive for testifying. A defense attorney noted that informant testimony is common in capital
5 cases but is often revealed late in the process of trial preparation (if not during trial), when little
6 can be done to investigate the informant or his claims. "Due to the frequent movement of
7 prisoners, the difficulties encountered in investigating jail house confessions are severe and
8 become nearly impossible with the passage of time." *Id.* at 44.

9 The Report was thus concerned that *prosecutors emerge from their role of ostrich*
10 *only after the informant's testimony is given, at which point a prosecutor may decide what*
11 *reward the testimony merits and whether to obtain it, without ever having had formal knowledge*
12 *of a "deal" that would have had to be revealed to the defense when the informant testified and*
13 *would have subjected him or her to impeachment.*

14 Furthermore, where the prosecution's delayed reward will not be determined until
15 after the informant testifies and the informant has another charge pending, the dangers of
16 fabrication are even greater:
17

18
19 The practice of waiting until *after* the testimony is provided, before
20 the informant's pending case is dealt with, may lend itself to some
21 troubling results. This may provide the informant with a basis for
22 assuming that his sentence will be measured by the assistance he
23 provides the prosecution by his testimony. In view of the benefits
24 that he may be seeking by his testimony, the potential for perjury
25 or shading of testimony for the prosecution must be recognized.

26 When the cooperating informant is told that it will be reported in
27 his favor if he gives 'truthful' testimony, it is only reasonable that
28 'truthful' to the informant means consistent with the prosecution's
theory of the case. Otherwise, of course, there is no point in
calling the informant as a witness. Such an incentive to provide
testimony may have a significant influence on the integrity of the
fact-finding process.

1 Secondly, the trier of fact cannot properly evaluate what influence
2 the benefits or expected benefits may have on the testimony.
3 When the trier of fact hears the informant testimony, the potential
4 favorable result to the informant is not yet determined. There is no
5 counterpart, nor should there be, on the defense side of the case,
6 wherein some undefined reward can be used as an inducement for
7 favorable testimony.

8 *Id.* at 95-96.

9 The Report documented numerous instances of such matters dating back to 1977.

10 *Id.* at 97-111; see also *id.* at 111-22. One LADA management official observed that *whenever*
11 *his office had a tough case with evidence:*

12 *a little on the thin side and a statement would certainly be helpful,*
13 *that sooner or later those statements become available to us. . . .*
14 *That is my suspicion that it is a fairly common practice [of the*
15 *Sheriff's Department to intentionally place inmates in proximity to*
16 *obtain incriminating evidence].*

17 *Id.* at 119 (emphasis added, bracket as used in Report).

18 This LADA deputy's perception demonstrated the "secret society's" operation in
19 high gear: the prosecution's "tough case" is wordlessly perceived by the jailers, who proceed to
20 "place" a known informant near the defendant and/or provide the informant with police reports or
21 other materials, so that the informant may manufacture the confession which ensures conviction.
22 The prosecutor can deny knowledge of the matter; the informant can testify he has been offered
23 nothing for his testimony, but can later be "rewarded" by the prosecution if the informant
24 "testifies well" and a conviction occurs.

25 The Report concluded that: "knowledge within the Office of the . . . Attorney
26 General of apparent abuses concerning jail house informants appears to have run concurrently
27 with similar knowledge with the [LADA] . . ." *Id.* at 125.

1 **C. In 1978, LACJ Inmate Mark Mikles Made a Secret Deal with LASD Officer**
2 **Lavona Shea for Mikles' Informant Testimony in Several Los Angeles Cases,**
3 **Then Repeatedly Lied about it While Testifying in *People v. Jackson*.**

4 The California Supreme Court has held that, in 1978, LACJ inmate Mark Mikles
5 had a secret deal with LASD Officer Shea for testifying in several Los Angeles cases, and that
6 Mikles had lied about the entire matter at the *Jackson* trial. *In Re Earl Lloyd Jackson*, 3 Cal. 4th
7 578 (1992). In *Jackson*, the California Supreme Court unanimously upheld the factual findings
8 of the Hon. Bernard S. Jefferson, sitting as referee, that: Mark Mikles secretly negotiated with
9 LASD Officer Shea for Mikles' snitch testimony in *People v. Earl Lloyd Jackson* (with the secret
10 pay-off to be contingent on the "results" of Mikles' testimony, *id.* at 597; as compensation,
11 Mikles received substantial, secret post-trial elimination or modification of prison sentences and
12 dismissal or non-prosecution of pending charges or cases (*id.* at 591-93); and the prosecution
13 had committed constitutional violations by failing both to disclose such inducements and by
14 failing to correct Mikles' false testimony, even though only Officer Shea knew about these
15 matters, and not the trial prosecutor. *Id.* at 595-96.

16 At the *Jackson* trial, Mikles originally testified that he heard Jackson confess
17 committing two murders, one of which Mikles described in graphic detail. *Id.* at 588. In
18 response to the prosecutor's question whether Mikles had ever told "any . . . sheriff, Hey, I have
19 got something to tell you, but you have to give me something in return. . . .," Mikles responded,
20 "[n]o, it doesn't work that way;" Mikles also claimed he was promised only ". . . a lot of
21 protection. . . ." for his snitch testimony. *Id.* at 589-90 (emphasis added).

22 The Supreme Court found this 1978 testimony to be "inconsistent" with Mikles'
23 1988 *Jackson* habeas reference hearing testimony, and held that Mikles had in fact told law
24 enforcement officers prior to his 1978 testimony that he wanted assistance in (1) having a 6 year
25

1 Long Beach sentence reduced; (2) receiving as little or no time on a number of pending Norwalk
2 charges; and (3) having a potential 42 month federal parole violation term eliminated (*id.* at
3 592), benefits which Mikles in fact ultimately received, *plus* (4) the "clearing" in Long Beach of
4 approximately 15 robberies. *Id.* at 593 n.7.

6 *Jackson* effectively held that Mikles committed perjury on each of these points.
7 *Jackson* then held that LASD Officer Shea told Mikles she would attempt to obtain Mikles'
8 above goals, if his "information was productive information, and it could be used, and we could
9 get a conviction." *Id.* at 592. *Jackson* noted that the Attorney General *conceded* the offers made
10 to Mikles "were inducements which constituted substantial material evidence bearing on . . .
11 credibility . . . and should have been disclosed to the defense." *Id.* at 594.⁶

13
14 **D. Mikles and Samuelson Ply Their Trade in San Joaquin County.**

15 Mikles told similar lies while testifying against Bernard Gordon in his capital
16 trial.⁷ Gordon was capitally charged and jailed in San Joaquin County, and tried in Fresno after
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22 ⁶
23 *Jackson* next held that, even apart from any such general constitutional duty of
24 disclosure, the prosecution had an additional constitutional obligation to correct Mikles'
25 testimony, which it should have known was false, because the prosecution was held to Officer
26 Shea's knowledge, since Shea "brought the informant . . . to the prosecutor's attention." *Id.* at
27 597-98.

28 ⁷
In re Gordon, No. 35128, Superior Court of the State of California, County of Fresno,
Sitting in San Joaquin County (San Joaquin No. 35456- Related to The California Court of
Appeal, 5th District Court, Case Nos. F015109 and F010369)

1 being granted a change of venue. Gordon Findings of Fact 7.⁸ Mikles, like Bruce Samuelson -
2 the snitch jail house witness used by the prosecution in this case, was incarcerated in the San
3 Joaquin County Jail on various charges during, among other times, 1982. Mikles lived in
4 Stockton in 1982 and 1984-1985, and was incarcerated in the SJCA on various charges during
5 those times. Gordon Findings of Fact 5.

7 Bernard Gordon originally was charged together with his brother, Patrick Gordon,
8 and Michael Caputo, but the charges against each defendant were eventually severed. SJDA
9 Deputy Terrence Van Oss represented the People at Patrick Gordon's 1984-1985 trial, which
10 resulted in a May, 1985, death sentence. SJDA Deputy Van Oss relinquished prosecution of the
11 remaining defendants, and ultimately was succeeded by SJDA Deputy Michael Platt, who
12 represented the People at Bernard Gordon's two trials, and at Michael Caputo's court trial. HRT
13 101 [Platt], 1989, 2038 [Van Oss].⁹ Platt was the SJDA Deputy who conducted the initial
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19 ⁸
20 In re Gordon, No. 35128, Findings of Fact and Conclusions of Law, Superior Court of the
21 State of California, County of Fresno, Sitting in San Joaquin County (San Joaquin No. 35456-
22 Related to The California Court of Appeal, 5th District Court, Case Nos. F015109 and F010369)
23 [hereinafter "Gordon, Findings of Fact"], filed on *February 23, 1999*.

24 ⁹
25 Habeas Reporter's Transcript ("HRT") refers to the reporter's transcripts from the habeas
26 corpus evidentiary hearings in In re Gordon, No. 35128, Superior Court of the State of
27 California, County of Fresno, Sitting in San Joaquin County (San Joaquin No. 35456- Related to
28 The California Court of Appeal, 5th District Court, Case Nos. F015109 and F010369). Habeas
Exhibit ("HEX") refers to the exhibits filed during the habeas corpus evidentiary hearings. This
record is a writing authorized by law to be recorded or filed and in fact is recorded or filed in a
public office, and it includes matters observed pursuant to duty imposed by law to which matters
there was a duty to report. Fed. R. Evid. 803(8), 901(b)(7). This record is readily attainable, and
respondent is in possession of a copy of same. Petitioner or respondent can produced a copy to
the court, if needed, and hereby requests that the court take judicial notice of the record

1 investigation of petitioner's case and his co-defendant *Ric Ortega*'s capital case, and on which
2 Deputy Van Oss later also worked. HRT 194-96 [Platt].¹⁰

3
4 Bernard Gordon's first capital trial on charges including murder and robbery
5 began on November 6, 1986 and concluded on January 27, 1987, when the jurors told the court
6 that they were deadlocked; the court declared a mistrial. The jury was hung 9-3 on the murder
7 charge and 8-4 on the robbery charge *for acquittal*, as conceded by the prosecutor, on the issue of
8 identity. Gordon Findings of Fact 7.

9
10 As was petitioner's case, Gordon's case also was a high-profile case, and had
11 received a fair amount of publicity. Mark Mikles conceded that he may have read newspaper
12 accounts of the case in 1984 and 1985, had heard a "scenario" of the case on the SJ CJ tiers, and
13 that it was one of the big cases being discussed in the SJ CJ while Mikles was there. HRT 1015,
14 1017-18, 1026 [Mikles].

15
16 Shortly before the start of trial, "Platt disclosed to [Gordon] that Mikles had heard
17 [Gordon] confess to the crimes charged." Gordon Findings of Fact 9.¹¹ "Mikles [like
18 Samuelson] contacted the San Joaquin County District Attorneys office, while incarcerated at the
19 county's jail, that he had (sic) information as to a number of cases being prosecuted by that
20 office." Gordon Findings of Fact 10. The prosecution, as in this case, provided "none of the
21

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24 Former San Joaquin County Deputy District Attorney Platt, the Deputy District Attorney
25 initially assigned to the investigation of petitioner's case has read the LAGJ Report on
26 informants, is aware of the Los Angeles informant scandal, and is aware that Mikles was part of
27 the scandal. HRT 114-15 [Platt].

28 11

Similarly, in petitioner's case, Samuelson entered the scene shortly before trial, and
approximately two years after petitioner had become incarcerated at the San Joaquin County Jail
for the charges in his case.

1 impeaching information or material [regarding the snitch] to petitioner at the time of [] trial."

2 Gordon Findings of Fact 24. As in this case "[t]he absolute arrogance of the [state] agencies in
3 disregarding the court's [discovery] orders [to provide impeachment material] is reprehensible."

4 Gordon Conclusions of Law at 8. "The evidence presented at [Gordon's] trial and at th[e]
5 evidentiary hearing, demonstrate (sic) one very cogent fact. Once Mikles became involved as an
6 informant, he soon realized that giving information to law enforcement agencies, gave him the
7 opportunity to get favors from those agencies." Gordon Findings of Fact at 10.
8

9 SJDA Deputy Platt thought that Mikles was a valuable and instrumental witness
10 in obtaining Gordon's conviction. Mikles had provided testimony that corroborated and
11 solidified the identification that the eye-witnesses made at trial. Platt believed that Mikles'
12 testimony was valuable and instrumental in the chain and the link of evidence at trial. HRT 554
13 [Platt]. Platt believed that identity was a major issue at Gordon's first and second trials, and that
14 Mikles testimony went to that issue and corroborated the testimony of the other prosecution
15 witnesses. Platt believed that Mikles' testimony also went to other aspects of the prosecution's
16 burden of proof of first degree murder, including the manner in which the shooting occurred, and
17 the potential motive. Platt believed that it was arguable that there were inconsistencies in the
18 accounts given by prosecution's eye-witnesses at the first trial, and that Mikles' testimony
19 corroborated the eye-witnesses' testimony and established the perpetrator's identity. HRT 575-78
20 [Platt].
21

22 *As with Samuelson in this case*, Mikles testified that Gordon had confessed to
23 committing the murder charged and the facts necessary to make the requisite special
24 circumstance charges, and revealed various specific details of the crimes. RT 4215-16. *As with*
25 *Samuelson in this case*, Mikles told numerous lies which the prosecution failed to correct or
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27
28

1 disclose. Instead, and as in this case, the prosecution capitalized on Mikles' lies and false aura of
2 credibility. As a result, the jury convicted Gordon on all counts on December 21, 1987. RT
3 5115-16. On January 14, 1988, the jury set Gordon's penalty at life imprisonment without the
4 possibility of parole. CT 666-67.

5
6 Prior to Mikles' testimony against Gordon, the SJDA was in contact with the
7 LADA, agreed to serve a subpoena on Mikles for the LADA, knew that Mikles was going to be a
8 witness at the imminent *In Re Jackson* evidentiary hearings, and knew that the propriety of
9 Mikles' account of a jailhouse confession in that capital case was at issue therein. Prior to
10 Gordon's sentencing and judgment, the SJDA's Office knew or should have known that Mikles
11 had testified in an "appellate" proceeding, *In Re Jackson*, at which Mikles' fabrication of
12 informant testimony concerning a jailhouse confession was at issue. None of these matters were
13 voluntarily disclosed to Gordon by the prosecution, at any time.
14

15
16 As a reward for testifying against Gordon, the BPT granted Mikles an early parole
17 to Southern California, effective November 19, 1987.
18

19
20 **E. The Prosecution Team Failed to Disclose the Existence of its Practices of**
21 **Providing Undisclosed, Sub-rosa, Post-testimonial Consideration to**
22 **Cooperating Prosecution Witnesses, in Both Los Angeles and San Joaquin**
23 **Counties.**

24
25 **1. The Los Angeles Grand Jury Report Establishes the Existence of Los**
26 **Angeles Law Enforcement's Sub-rosa Practices of Providing Post-**
27 **testimonial Consideration to Cooperating Prosecution Witnesses, as**
28 **Accepted by the California Supreme Court in *In re Gonzalez*.**

The Los Angeles Grand Jury Report, discussed *ante*, establishes the existence of
Los Angeles law enforcement's sub-rosa practices of providing post-testimonial consideration to
cooperating prosecution witnesses. SJDA Deputies and investigators also engaged in a habit,

1 practice or plan of providing undisclosed, post-testimonial consideration to cooperating
2 prosecution witnesses, including informant witnesses and jail house witnesses. Deputies and
3 investigators provided such undisclosed consideration in a variety of forms, and through a variety
4 of means, many of which were similar if not identical to practices discussed in the LAGJ Report.

5 Deputies and investigators "expected" informant witnesses to routinely return
6 after testifying and ask for additional consideration for past testimony or cooperation with the
7 prosecution. It was not uncommon for Deputies and Investigators to receive telephone calls or
8 letters from such informant witnesses. The letters were often not retained. The telephone calls
9 were often not recorded. It was purely up to the individual Deputy or Investigator.

10 Sometimes consideration was secretly promised to the informant or cooperating
11 witness, or to that person's attorney. Other times, the consideration was secretly bestowed on the
12 prosecution witness as a "thank you" by the prosecutor, with no explicit pre-testimonial
13 agreement.

14 However, as described in the LAGJ Report and by Mikles, such practices are well
15 known in the informant community. Informants, or similar "cooperating" prosecution witnesses,
16 have an expectation of such post-testimonial prosecutorial consideration, whether it is promised
17 or not. As SJDA Deputy Blansett explained to one potential jailhouse informant witness, even if
18 Blansett made no promise to provide benefits, any "reasonable" judge or prosecutor whom the
19 informant encountered in the future would certainly take into account the informant's
20 "cooperation" with Mr. Blansett.

21 Furthermore, the SJDA provided no formal training regarding informants or
22 similar cooperating witnesses. But junior deputies consulted senior deputies concerning cases.
23 Two of the most senior deputies were Blansett and Van Oss. Both Blansett and Van Oss
24 bestowed undisclosed, post-testimonial consideration on informants or cooperating prosecution
25 witnesses. Other Deputies followed the same habit, practice, or plan. Such matters were
26 material and should have been disclosed to petitioner and his jury, but were not.
27
28

1 The SJDA's structure and recent history establish the existence of such habits,
2 practices and plans within the SJDA. The SJDA's Office had a number of different internal
3 administrative and supervisory structures throughout the 1980's. HRT 1989-92 [Van Oss]. In
4 the early 1980's, the SJDA was organized into two teams of Deputies, called the blue team and
5 the red team. The division was to create more administrative control over case flow. HRT 1989-
6 90 [Van Oss].

7 SJDA Deputy Van Oss¹² was supervisor of the SJDA red team; (former) SJDA
8 Deputy Demetras¹³ was in charge of the blue team. HRT 2054 [Van Oss]. Other than that time,
9 all the Deputies in the SJDA were answerable to SJDA Deputy Van Oss in one form or another.
10 HRT 2056 [Van Oss].

11 While supervisor of the red team, SJDA Deputy Van Oss supervised several
12 Deputies who for the most part were less experienced than he, and with whom he discussed case
13 strategy and issues that came up. Although SJDA Deputy Van Oss was not one of the most
14 senior attorneys in terms of years, he had more than average experience in terms of the type of
15 cases he had handled. HRT 1990 [Van Oss]. He was in charge of assigning cases within the red
16 team, including homicides. HRT 1991, 1998 [Van Oss].

17 In the early 1980's, the SJDA had one of one or two charging deputies or intake
18 deputies, through whom new cases were channeled. Deputy Van Oss was not one of the
19 charging deputies, but he did do a lot of charging because often in special cases the police came
20 directly to him, or were directed to him by the SJDA administration. The police came to him
21 directly because he was chief trial deputy for a while, and was higher up in the SJDA
22 administration, and because he sometimes had working relationships with particular police
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26 Terrence Van Oss was appointed as a San Joaquin County Superior Court Judge in
27 December, 1989. HRT 1987 [Van Oss].

28 ¹³

Steven Demetras was later appointed as a San Joaquin County Superior Court Judge.
HRT 1990 [Van Oss].

1 officers. HRT 1992-93 [Van Oss]. SJDA Deputy Van Oss was SJDA chief trial deputy from
2 1983-1985. In that context, he was a supervisor for SJDA Deputy Platt. HRT 1991, 2055 [Van
3 Oss]. As chief trial deputy, SJDA Deputy Van Oss also was responsible for making decisions
4 with the SJDA as to whether or not special circumstances were to be alleged in a given case;
5 SJDA Deputy Van Oss continued to so participate until January, 1987, when a new SJDA was
6 installed, and SJDA Deputy Van Oss resigned as chief legal assistant. HRT 1996-98 [Van Oss].

7 During the same period, SJDA Deputy Van Oss drafted an SJDA procedure or
8 policy manual. The manual did not contain a section addressing informant witnesses, although
9 they may have been discussed within broader sections taken from manuals from larger counties,
10 such as Los Angeles. HRT 1998-99 [Van Oss].

11 After Al Norris retired, there were two assistants to the SJDA. From 1985-1987,
12 SJDA Deputy Van Oss was one of the two assistants to the SJDA, and was in charge of the legal
13 end of the office. In that context, he was also a supervisor for SJDA Deputy Platt, and other
14 Deputies throughout the office. SJDA Deputy Platt handled a lot of the more serious cases in the
15 office. SJDA Deputy Platt discussed issues and strategy with SJDA Deputy Van Oss. HRT
16 2055-67 [Van Oss].

17 From January 1, 1983 to December 31, 1987, SJDA Deputy Van Oss was either
18 chief trial deputy or chief legal deputy, and responsible for assigning homicides to other
19 Deputies. HRT 1997-98 [Van Oss]. As discussed further, *post*, in *People v. Hayes*, Deputy Van
20 Oss made a secret agreement to provide post-testimonial benefits to a prosecution witness in a
21 capital case, and did not disclose the matter to the capital defendant.

22 A new SJDA was elected in 1986; one administrative change he emphasized was
23 to make more divisions among trial units. HRT 1999-2000 [Van Oss]. The SJDA's homicide
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1 team was formed in 1987, with SJDA Deputy Eual Blansett¹⁴ supervising four homicide team
2 Deputies, including Deputies Van Oss, Platt, William Murray, Chuck Convis, and later, Key
3 Deli; the homicide team decided whether special circumstance allegations would be made in a
4 given case. The homicide team held weekly meetings, at which discussions addressed Blansett's
5 agenda, and individual cases, case progress, case problems, and overall policies (such as a
6 prohibition on dispositions without Blansett's approval, discussed further, *post*). HRT 1997,
7 2000, 2055, 2062-63 [Van Oss], 1773, 1779-81, 1784-85 [Blansett].

8 The homicide unit meeting agenda also addressed current issues, including issues
9 brought up by management, and legal issues, and re-occurring issues. Periodically, Blansett
10 conferred with SJDA Phillips and discussed homicide issues, if there was new case law. Legal
11 issues were discussed because, despite the fact that the homicide unit deputies had been
12 prosecutors for a long time, none were real experts in the law, particularly as it related to
13 homicide law. Blansett saw it was his job to educate the unit as to issues that dealt with
14 homicides. Sometimes when homicide unit deputies began to really research the law
15 specifically, they found that a lot of their legal ideas were not correct. Blansett tried to pass
16 things along, as did the deputies in the unit. HRT 1782-84 [Blansett].

17 On occasion, a deputy would bring up for group discussion the difficulties he or
18 she had with a case. HRT 1784 [Blansett]. Homicide team deputies came to Deputy Blansett for
19 advice on cases; that was part of his role, as homicide team supervisor. HRT 1777, 1785
20 [Blansett]. Homicide deputies would also seek out for advice other deputies who had specific
21 insight into a specific problem or area of law. HRT 1785-86 [Blansett].

22 As homicide team supervisor, SJDA Deputy Blansett's job included intake,
23 quality control, and support. HRT 1777 [Blansett]. Blansett's job was to make sure that deputies:
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1 were aware of recent changes in the law, had adequate training, and developed any skills in
2 which the deputies were deficient. HRT 1776-77 [Blansett].¹⁵ As supervisor, Blansett tried no
3 cases from 1987-1989, because he was occupied supervising the homicide unit. HRT 1791
4 [Blansett]. SJDA Deputy Blansett also did the intake on every case that could possibly be filed
5 as a homicide, aided law enforcement in all potential homicide investigations by providing legal
6 help and investigatory insights, and acting as the on-call deputy for all homicide investigations.
7 HRT 1773-74 [Blansett].

8 The homicide unit had regular team meetings, but informants were only discussed
9 if the topic came up in the evaluation of a given case's strengths and weaknesses. HRT 107-08
10 [Platt].

11 SJDA Deputy Blansett continued as homicide team supervisor until 1992, when
12 the county's budgetary problems lead to elimination of the supervisor position; he then continued
13 as a homicide team member, until 1994. As of 1992, the homicide team was supervised by the
14 Assistant DA, who was then Deputy William Murray. HRT 1773-74 [Blansett].

15 Before 1987, everyone in the office prosecuted homicides; after 1987, the vast
16 majority of homicides were prosecuted by the homicide unit. After 1987, homicides were
17 sometimes assigned to deputies outside the homicide unit, both to train and allow performance
18 evaluation of potential new members of the homicide unit, and, to manage the case load, because
19 on occasion there were more homicides than the unit could handle; only the less serious
20 homicides were assigned out. HRT 1786-87 [Blansett]. SJDA Deputy William Herrell was not a
21 member of the homicide team. HRT 2061 [Van Oss]. SJDA Deputy William Herrell prosecuted
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25 Blansett's job was also to develop quality control within the homicide unit, and provide
26 oversight of other deputies to insure uniformity of results: he did a twenty year study of all
27 homicide dispositions, as a result of which he was *appalled* and decided to create quality
28 standards regarding how homicides were to be resolved. That standard was that no homicide
could be resolved without Mr. Blansett's approval. It was the number one rule, against which
others were insignificant. HRT 1776, 1778 [Blansett]. Blansett's study established that the
SJDA historically had never filed very many special circumstance cases. HRT 1790 [Blansett].

1 the *Johnson* homicide, which occurred at Deuel Vocational Institute ("DVI"), at Tracy, and
2 consulted with SJDA Deputy Van Oss concerning that case, its issues, and other cases. HRT
3 2060-61 [Van Oss].

4 SJDA Phil Urie was not a member of the homicide unit. HRT 1787 [Blansett].

5
6 **2. General SJDA Policies and Practices.**

7 **A. There Were No Informant Policies or Training Regarding**
8 **Informants, Apart From Blansett's Informal Training.**

9 From 1971-1989, and at the time of petitioner's conviction, the SJDA had no
10 formal or official policies regarding use of informants (HRT 106 [Platt], 1987, 2001 [Van Oss],
11 1682-83 [Herrell]), and no training sessions regarding the use of informants as prosecution
12 witnesses. HRT 2001 [Van Oss], 1687 [Herrell].¹⁶ However, Blansett did informally provide
13 training to other deputies regarding informants, by way of discussion whenever the issue came
14 up. HRT 1826 [Blansett].¹⁷

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16 ¹⁶ Blansett believed that Deputy Murray had conducted an informant seminar after 1992.
17 HRT 1826 [Blansett].

18 ¹⁷ Blansett testified that he believed it was important to verify an informant's past life, but
19 that there was little one could do other than contact the law enforcement officers the informant
20 was dealing with at that time, or previously, to verify what that informant had done, whether the
21 informant had given testimony in other cases. The most important thing was to call to find out if
22 there had been anything negative about the prior testimony. Blansett also wanted to find out
what kind of benefits the informant received for past informant testimony. HRT 1829-32
23 [Blansett].

24 Blansett also testified that if the informant got an inordinate benefit in a previous
25 case and a paltry benefit from Blansett, then that was a fact to be emphasized to the jury, i.e., that
26 the informant "was getting practically nothing and he's still telling the truth. Blansett also
27 believed that, the less consideration an informant receives for his or her testimony, the more
28 credible they probably seem to a jury. HRT 1854-55 [Blansett]. This was particularly
meaningful, given Blansett's description of his practice of providing non-disclosed consideration
to cooperating witnesses after they testified, and his admonition to an informant that the
informant's judge would surely take the informant's cooperation into consideration for the
informant.

1 The SJDA did not maintain any cumulative files or base of information on the
2 SJDA's use of informants (HRT 685-86 [Dillon]), nor an informant index (HRT 106 [Platt]), nor
3 did any of its Deputies. HRT 106-07 [Platt]. The SJDA did not have a policy or practice
4 regarding documentation of benefits provided inmate witnesses.¹⁸ HRT 1832 [Blansett]. SJDA
5 Deputies did not maintain files on informants. HRT 107 [Platt]. SJDA Deputies could only
6 learn whether other Deputies had knowledge of or experience with a specific informant by asking
7 other Deputies on a case-by-case, instance-by-instance basis. HRT 107 [Platt]. However, there
8 was no means to compensate for office turnover of staff, and the loss of knowledge when staff
9 members left the office. HRT 687 [Dillon, re: investigators].

10
11 Deputies had no systematic way to discover if an inmate informant witness had
12 previously been rejected by another Deputy in the office. HRT 1691 [Herrell]. There were only
13 two SJSD investigating officers who worked on prison-type cases, so they sometimes provided
14 Deputies with information concerning prison inmate witnesses; there was no comparable
15 information concerning county jail inmate witnesses. HRT 1692 [Herrell].

16 Individual SJDA Deputies made decisions how to proceed with informant
17 witnesses individually, by conducting discussions among the Deputies, and with the
18 administration. HRT 2001 [Van Oss]. The SJDA had no formal policy regarding: how far

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21 Deputy Blansett did have a practice of documenting in a written agreement all deals
22 involving someone who was testifying against a co-participant in the crime at issue. HRT 1832-
23 36 [Blansett]. That written contract included a recitation of the known facts of the case, "mainly
24 because it gives me a chance to put before the jury in a written document my closing argument."
25 HRT 1834 [Blansett]. The contract also included the informant's name and pending charges, a
26 history of the procedural aspects of the case, the fact that the informant witness promised to
27 testify truthfully, and the benefits which the witness was to receive if the witness testified
28 truthfully. The agreement was disclosed to the defense. HRT 1834-35 [Blansett].

26 However, Blansett emphatically stated and explained he does not disclose to the defense
27 any benefits which he confers on informant witnesses, *after the witness testifies for the*
28 *prosecution*. HRT 1835-36 [Blansett]. This is consistent with examples Blansett provided of
several cases in which he conferred post-testimonial benefits on informant witnesses, after they
testified, as discussed further, *post*, in the discussion concerning Blansett's practi

1 prosecutors could go with informant benefits; it was a personal decision for each Deputy, and
2 certainly for Deputy Platt. HRT 175 [Platt]. The only SJDA guideline or rule that applied to use
3 of informants by the SJDA was "you didn't promise 'em anything. . . . [¶] [¶] [because] [y]ou
4 didn't want it to appear to be -- to be buying their testimony." HRT 685 [Dillon].

5 Numerous past and present SJDA employees agreed that informants commonly
6 seek additional consideration for their efforts long after the informant has testified for the
7 prosecution, e.g., when the informant has encountered new legal problems such as criminal
8 charges. HRT 108 [Platt], 699-700 ("many times") [Dillon], 2006, 2066 [Van Oss], 1695
9 [Herrell].¹⁹ Former informant witnesses commonly requested that SJDA employees write letters
10 after the informant witness had testified, and later picked up a new charge in another jurisdiction.
11 HRT 700 [Dillon].

12 Dillon, for one, discussed such contacts with other SJDA employees. HRT 700
13 [Dillon]. Other investigators and deputies received requests from informants, just as he did.
14 HRT 701 [Dillon]. It was one reason not to use informant witnesses, "unless you absolutely have
15 to," i.e., because they would come back later, seeking favors. HRT 700-01 [Dillon].

16 The SJDA had no clearance procedure for Deputies writing letters on behalf of
17 inmate witnesses. HRT 1768 [Herrell]. SJDA Deputies wrote such letters on behalf of inmate
18 witnesses to the BPT and other authorities who had the power to grant consideration to the
19 informants concerned, which was the purpose of such letters. HRT 673 [Dillon]. It was a
20 practice in the SJDA office. HRT 673 [Dillon]. On occasion, SJDA investigators arranged such
21 consideration in compensation for informant testimony. SJDA Investigator Dillon had done so
22 on "a couple of dozen. . . ." occasions, and had written letters such as his October 8, 1987 letter
23 (on behalf of Mikles, to the SSU's Jimmy Guiton), "probably not" more than ten times. HRT
24 692, 699 [Dillon].
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28 Deputy Blansett disagreed, saying he had never had a jailhouse informant ever come back
and ask him for anything. HRT 1809 [Blansett].

1 Individual Deputies had a general awareness of the LACJ informant scandal (e.g.,
2 HRT 1687 [Herrell]) and that Mark Mikles was associated with those improprieties. HRT 1713
3 [Herrell]. Awareness of the scandal gave rise to a perception that Deputies should use more
4 caution in dealing with inmate informant witnesses, and "there were some changes." HRT 1687
5 [Herrell].²⁰ However, there were still no formal office guidelines or training concerning the
6 matter. HRT 1688 [Herrell].²¹

7 SJDA Deputy Blansett testified that Deputies were always careful, in homicide
8 cases, that the police didn't give away details of the homicide in the newspaper, because
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10 that's a real source of information to people who were in jail. You
11 can pick up a newspaper, you read about a homicide, you get a few
12 facts, and then you can develop that into a story. We were always
13 concerned about that. [¶] So . . . when we were investigating
14 homicides we didn't want our police officers to give any facts
15 regarding the homicide out in the event that someone in fact after
16 did come in to give us information, we could test that information
17 based upon what we knew and not what had been in the
18 newspaper. That was very important to us.

19 HRT 1801 [Blansett].
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The changes were to protect SJDA Deputies: e.g., Deputy Herrell became more cautious
in taking steps "so that it wouldn't appear that I was giving [the inmate witness] something."
HRT 1710 [Herrell].

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25 The SJDA's absence of guidelines for dealing with informants was parallel with a similar
26 absence of guidelines in the SJSD. Pete Rosenquist has been an SJDA investigator for about two
27 years. For the preceding sixteen years, he had been employed by the SJSD. In the SJSD,
28 Rosenquist had handled about one hundred fifty homicide cases, about half of which involved
informants. The SJSD had no guidelines for dealing with informants. HRT 507-08
[Rosenquist].

**B. Deputies Sought Advice From More Experienced Deputies,
Including Deputies Van Oss And Blansett.**

In the period before the 1986 (November) election, SJDA deputies sought advice from one another concerning cases; less-experienced people tended to seek experience from more experienced people, and often sought advice from SJDA Deputy Van Oss. HRT 1999 [Van Oss]. After 1987, homicide team deputies came to Deputy Blansett for advice on cases; that was part of his role, as homicide team supervisor. HRT 1777, 1785 [Blansett]. Deputies would also seek out other deputies who had specific insight into a specific problem or area of law. HRT 1785-86 [Blansett]. Similarly, if a given deputy was having problems with an individual case, SJDA Deputy Van Oss sometimes discussed the problems one-on-one with the Deputy in question. Other senior deputies were similarly consulted. HRT 2064-65 [Van Oss].

As discussed further, *post*, in *People v. Hayes*, Deputy Van Oss made a secret agreement to provide post-testimonial benefits to a prosecution witness in a capital case, and did not disclose the matter to the capital defendant. Similarly, as discussed, *post*, Blansett provided post-testimonial consideration to prosecution witnesses, as a "thank you," and saw no need to disclose such matters to the defendants against whom his witnesses had testified. Such activities were a practice in the SJDA, which should have been disclosed to petitioner and his jury at trial.

**C. Inmate Witnesses Sought Assistance, Including References to
Other Law Enforcement Officers.**

Inmate witnesses asked SJDA Deputies to provide help, including contacting various law enforcement agencies, and advising that agency of the inmate witness' prosecution testimony, without advising the SJDA Deputy why that was desirable. HRT 1693 [Herrell].

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3. **Former SJDA Deputy Platt's Testimony Establishes the Existence of San Joaquin Law Enforcement's Practice of Providing Post-testimonial Consideration to Cooperating Prosecution Witnesses.**

A. **Former SJDA Deputy Platt's Practices With Informants.**

Platt was employed by the SJDA from 1977 through April of 1988, and from approximately April of 1990 through September 1994. He worked in the SJDA homicide unit from its inception until he left the SJDA. HRT 102 [Platt]. In addition to being the initial investigating deputy on this case, Platt tried six special circumstance homicide cases; five defendants received life without parole, and one -- the last such case, in 1994 -- resulted in a death verdict. HRT 102-03 [Platt].²²

SJDA Deputy Platt used informant witnesses in six to nine cases. HRT 106 [Platt]. He testified that it was his personal policy:

I would have my investigator or either the DA or my investigating officer with the law enforcement agency make contact, find out what it was the individual had to say, what their status was, if in fact they were in custody or out of custody, or review that information with what I had in the police reports and make a determination about whether I wanted to talk to the individual, to follow-up on him.

HRT 106 [Platt].

It was Platt's experience that the most common reason that an informant witness would come to his attention was that the informant was looking for something in return for testifying. He never had the experience of one coming forward out of the goodness of the informant's heart and nothing else. It was SJDA Deputy Platt's experience that informants commonly sought additional consideration from him after they testified, when the informants faced new criminal charges, as Mark Mikles did. HRT 108 [Platt].

²²

Platt was appointed as a judge to the Superior Court in San Joaquin County thereafter.

1 Under such circumstances, it was SJDA Deputy Platt's standard practice, when
2 requested, to contact the prosecuting agency and bring to its attention the fact that the informant
3 had testified previously for SJDA Deputy Platt. When Mark Mikles so contacted Platt, it did not
4 surprise him; it had happened on previous occasions with other informants, and he had contacted
5 other prosecutors under such circumstances previously, and possibly contacted judges. HRT
6 109-10 [Platt].

7 SJDA Deputy Platt had been warned by other prosecutors against using
8 informants on more than one occasion. HRT 110-12 [Platt]. The court warned SJDA Deputy
9 Platt against using Mikles in the Gordon case. HRT 112 [Platt]. SJDA Deputy Platt denied that
10 any law enforcement officers warned him not to have Mikles testify in that case. HRT 112
11 [Platt]. Platt claimed that the warnings concerning informants and in particular, Mikles, did not
12 effect the effort Platt put into investigating Mikles. HRT 113 [Platt].

13 SJDA Deputy Platt was aware of the LACJ informant scandal, and read the Los
14 Angeles Grand Jury Report concerning informant improprieties. HRT 114 [Platt]. Reading the
15 report did not cause SJDA Deputy Platt to change his practices concerning informants; he
16 maintained that he did not learn much from the report, apart from how the scandal came about.
17 HRT 114 [Platt]. He is aware that Mikles was part of the LADA informant scandal. HRT 115
18 [Platt].
19
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21 **B. Former SJDA Deputy Platt's Practices With Mikles.**

22 All of former Deputy Platt's experiences with and testimony regarding Mark
23 Mikles, discussed elsewhere herein, must be factored into this analysis. Platt generally testified
24 that all his steps with Mikles were part of his normal procedure in the SJDA's office.

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1 C. Former SJDA Deputy Platt's Experience With Informant Kym
2 Hatfield.

3 Platt's experiences with Kym Hatfield, and the related experiences of other SJDA
4 Deputies, are illustrative of practices within the SJDA's Office, in responding to a volunteer SJCJ
5 informant, who was a veteran of the LACJ informant system. Kym Hatfield was a long-time
6 LACJ informant and associate of Mark Mikles in the LACJ snitch tank; they were introduced by
7 the well-known LACJ informant, Leslie White; Hatfield and Mikles worked on cases together as
8 informants, and worked together with Long Beach Officer Bob Gillissie (HRT 293-94 [Shea],
9 791 *et seq.* [Mikles].

10 SJDA Deputy Platt had contacts with informant Kym Hatfield concerning San
11 Joaquin County homicide cases, but claimed to be unaware that Hatfield had been a
12 contemporary of Mikles when they were housed together in the LACJ snitch tank in the late
13 1970's and early 1980's. HRT 116 [Platt]. Platt participated with SJDA Deputy Murray²³ in
14 receiving phone calls from Hatfield, which were tape recorded, although it was not SJDA Deputy
15 Platt's normal practice to tape-record such calls. SJDA Murray made the decision to record the
16 call, because SJDA Murray received the call in his office, it concerned his case, and it was SJDA
17 Murray's practice to record such calls. HRT 116-17 [Platt].

18 SJDA Deputy Platt decided not to use Hatfield as a trial witness, because he had
19 concerns about Hatfield's credibility and believability, but could not remember specifically what
20 those concerns were. HRT 594-95 [Platt]. Hatfield was a long time LACJ informant, a narcotics
21 addict who was variously prosecuted and incarcerated in the San Joaquin County Jail for several
22 years during the 1990's. His attorney asked the prosecuting SJDA Deputy to contact various law
23 enforcement officers to vouch for Mr. Hatfield, including Long Beach Officer Logan Wren.
24 Hatfield was arrested by San Joaquin Probation Officer Botiller, on April 7, 1994. He was acting
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28 In 1995, SJDA Deputy Murray was appointed to serve as a San Joaquin County Superior
Court Judge. HEx 32, ¶ 1.

1 as an informant concerning a Modesto homicide, and was also working with Stockton police
2 officer Armstrong on the *Auten* case. Hatfield was released on his own recognizance on April
3 11, 1994; the Stockton police department wanted Hatfield available to "work" on the *Auten* case.
4 Stanislaus County also wanted Hatfield available to testify in its murder case. SJDA Deputy
5 Willett advised Stanislaus County of what had been done for Hatfield in his San Joaquin County
6 case. HEx. 39 ¶ 4-7 [Willett]. *Auten* was a San Joaquin County homicide case. HEx. 32 ¶ 18
7 [Murray].

8 After the charges in *Auten* were filed, Hatfield made several calls from the San
9 Joaquin County Jail to San Joaquin County law enforcement on April 8, 1994 -- one day after he
10 had been arrested -- which were tape recorded and compiled on a cassette tape filed as HEx. 33.²⁴
11 On the tape, Hatfield claims that Auten has confessed to committing the homicide to Hatfield,
12 and has solicited Hatfield to kill witnesses against Auten. HEx. 33 [tape], HEx. 32 ¶ 18, 25-28
13 [Murray].

14 Platt was the *Auten* prosecutor. The initial call was probably forwarded to Murray
15 because he was the Homicide Unit Supervisor at the time. Murray always tried to tape such calls
16 from informants, and the call was taped because it came to Murray. His part in the conversations
17 is representative of how his conversations with informants typically proceeded. HEx. 32 ¶ 18,
18 23-24, 29 [Murray]. The conversation appears to demonstrate, in part, Hatfield's eagerness to be
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21 The conversations on the tape are out of order. Voices on the tape identify the first
22 conversation on the tape as an interview occurring on 4/8/94, between Hatfield, Detective Dave
23 Anderson, and Officer Gary Armstrong. The fourth conversation on the tape is actually the first
24 telephone conversation then-SJDA Deputy Murray had with Mr. Hatfield, apparently on the
25 same day, 4/8/94, which begins with Hatfield identifying himself to Murray. The third
26 conversation on the tape is actually the second conversation Murray had that day with Hatfield.
27 That conversation begins with Murray addressing Hatfield as "Kym" over the telephone. The
28 tape's second conversation is actually the third conversation Murray had that day with Hatfield.
That second conversation begins with Murray addressing Hatfield as "Kym" over the telephone,
after which Murray identifies himself and states that also present in Murray's office at that time
were Gary Armstrong and Deputy District Attorney Mike Platt, the prosecutor then assigned to
the case. Murray recalls Hatfield's calling the SJDA and Murray getting a hold of Detective
Armstrong and SJDA Deputy Platt. HEx. 32 ¶ 19-22 [Murray]

1 released from custody, familiarity with the County phone system, persistent calls to numerous
2 entities on one day, attempts to get those entities to contact one another on Hatfield's behalf and
3 ensure his release.²⁵
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5 **D. Former SJDA Investigator Dillon's Testimony Establishes The**
6 **Existence of San Joaquin Law Enforcement's Practice of**
7 **Providing Post-Testimonial Consideration to Cooperating**
8 **Prosecution Witnesses, Mark Mikles' Knowledge Thereof,**
9 **Mikles' Expectation of Receiving Such Consideration for His**
10 **Testimony in *Gordon*, and Mikles' Receipt of Such**
11 **Consideration.**

12 All of former Investigator Dillon's experiences with and testimony regarding
13 Mark Mikles, discussed elsewhere herein, must be factored into this analysis. Dillon generally
14 testified that all his steps with Mikles were part of his normal procedure at the SJDA's office.
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18 On the second conversation on the tape, Hatfield asks Murray, "what do I do, sit in here
19 until his case is over?" or words to that effect. Hatfield then describes his own case in which a
20 probation violation hearing is scheduled for "Monday." Hatfield identifies his probation officer
21 as Ms. Botiller, discusses having made calls to the Stockton Police, indicates a knowledge of law
22 enforcement police numbers and familiarity with law enforcement phone procedures, and makes
23 a persistent set of inquiries regarding whether he will be released from custody the following
24 Monday. Murray advises Hatfield that Hatfield seems "to have a good handle on that." HEx. 33
25 [tape].

26 On the tape's third conversation, Hatfield begins by asking whether anyone from Modesto
27 or Stanislaus had just called Murray, because "they" were supposed to call and confirm that
28 Hatfield was acting as an informant there. Murray repeats that he cannot make any promises.
Hatfield relates that his own knows about his past, that "I'm testifying and everything and that
everything can be "discuss"-ed "at the bench." Murray responds "right" and "be seeing you on
Monday." HEx. 33 [tape]. On the tape's fourth conversation, Hatfield ends by asking that
Murray "transfer me over to probation," gives the probation phone number, and specifies he
knows that it is unnecessary to dial the first two digits (HEx. 33 [tape]), by implication, because
Hatfield knows the two calls would be made between two County lines, thereby demonstrating
his familiarity with the County phone system.

1 **E. SJDA Deputy Blansett's Testimony Establishes the Existence**
2 **of San Joaquin Law Enforcement's Practice of Providing Post-**
3 **testimonial Consideration to Cooperating Prosecution**
4 **Witnesses.**

5 SJDA Deputy Blansett testified that he did not believe that the prosecution's
6 provision of post-testimonial consideration required disclosure to the defendant against whom
7 the informant testified. SJDA Deputy Blansett also gave numerous examples of instances in
8 which he personally afforded such post-cooperation consideration to former prosecution
9 informant witnesses.²⁶

10 **F. SJDA Deputy Blansett Testified That He Did Not Believe Post-**
11 **Testimonial Consideration For An Informant Required**
12 **Disclosure.**

13 SJDA Deputy Blansett testified that benefits which a prosecution informant
14 witness receives during trial are disclosed to the defense. However, benefits which a prosecution
15 witness receives *after* trial:

16 *normally are not disclosed because, as far as I look at it, the only*
17 *benefit that I bargained for is on the record.*

18 *If the person comes to me afterwards, a year later, two years later,*
19 *three years later, and -- and they say, 'Hey, look' -- I'm just using a*

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21 ²⁶

22 Blansett initially testified he had no contacts concerning Mikles and the *Maahs* case, or
23 the *Gordon* case, or contacts with Platt or Dillon concerning this case. When shown notations on
24 HEX. 6 indicating he was contacted by the BPT concerning Mikles' consideration in this matter,
25 he testified his recollection was not refreshed. However, when shown Ex. X, attached to
26 Petitioner's Post-Oral Argument Supplemental Brief -- counsel's December 26, 1990 letter to
27 SJDA Phillips requesting disclosures concerning Mikles -- Blansett conceded that he had written
28 the response dated January 16, 1991, which appears as page 5 of that exhibit. Blansett believed
 that the matter had not been referred to Platt, because Platt was not with the SJDA at that time.
 He had a recollection of calling Platt when Platt was in private practice, and it may have been
 about this. Blansett volunteered that his letter was his past recollection recorded, concerning the
 information he relayed from Platt. Blansett effectively conceded his memory had been wrong
 about his having had contacts regarding Gordon's case. HRT 1837-44 [Blansett].

1 hypothetical 'cause it's never happened except *when I've seen*
2 *people from time to time, I've done some -- I've done things for*
3 *them*, but they haven't come to me asking for benefits.

4 The -- but these things aren't something that were part of the record
5 because they're not things that were ever anticipated.

6 HRT 1835-36 [Blansett] (emphasis added).

7 As Blansett explained regarding one informant's post-testimonial benefit,
8 *it was just sort of an after-the-thought thank you for his being a*
9 *part of my trial and being such a good witness. But it was nothing*
10 *that was ever bargained with [the informant witness]. It was*
11 *something I just did on my own.*

12 HRT 1836 [Blansett] (emphasis added).

13 Blansett gave this example at the end of a discussion concerning his use and
14 disclosure of written cooperation agreements with informant witnesses who were co-participants
15 in the crime at issue in the underlying case. HRT 1832-36 [Blansett]. However, Blansett's
16 testimony -- including his repeated description of post-testimony consideration he bestowed as a
17 "thank you" on other informant witnesses who did not have such written agreements -- made it
18 clear that Blansett believed that no disclosure of such benefits was required, and that he made
19 sure informant witnesses knew their cooperation would be so rewarded later.

20
21 **G. Blansett's Explanation to the *Blatt* Informant That Any**
22 **Reasonable Judge Would Take the Informant's Testimony into**
23 **Consideration on That Informant's Behalf.**

24 Blansett explained a key point to the SJDA's practice with informant witnesses:
25 no deal need be made with the informant; the informant could be told that cooperation would
26 inevitably be taken into account by that informant's sentencing judge. As informants are a
27
28

1 community and share information and expertise (*see, e.g., 1217, et seq.* [Mikles], Blansett's
2 lesson was one which no doubt was shared among informants, and shared by Blansett and other
3 SJDA Deputies with informant witnesses whom they encountered.

4 SJDA Deputy Blansett testified that an informant who was an inmate and
5 belonged to the Aryan Brotherhood (but whose name Blansett could not remember) was willing
6 to testify as a prosecution witness in the *Blatt* case. The SJDA, Phillips, initially "nixed" this
7 informant's testimony, and later Judge Kim excluded the testimony due to late discovery. HRT
8 1794-95 [Blansett].

9 The Aryan Brother informant was in custody in Alameda County on "very serious
10 charges" and "came forward with information that we were willing to use." HRT 1804
11 [Blansett]. This informant "sent a message through channels asking for us to go. . . ." see him.
12 SJDA Deputy Blansett's investigator went to see the man first, and then Blansett interviewed the
13 informant. Blansett told the informant not to discuss his own case, "since his attorney wasn't
14 aware of the fact that we were here we in no way could make him any promises whatsoever in
15 regards to his case." HRT 1806 [Blansett].

16 But, SJDA Deputy Blansett then testified that:
17

18
19 We told him that he would receive absolutely no benefit from it as
20 far as we were concerned because he was in custody in Alameda
21 County.

22 We told him that if he came forward and testified, certainly any
23 reasonable person, whether it's a judge, a prosecutor or someone
24 in the state prison, would in fact take that into consideration
25 favorably on his behalf, but we weren't in a position to be able to
26 offer him anything. And he was still willing to come forward and
27 testify.

28 HRT 1804-05 [Blansett] (emphasis added).

//

H. Admission of Non-Disclosed, Post-Testimonial Consideration
for the *Manuel Gonzalez* Informant.

SJDA Deputy Blansett testified that a jail house informant (whose name Blansett initially could not remember) testified as a prosecution witness in the *Manuel Gonzalez* case. HRT 1793-94 [Blansett]. Blansett initially discussed this informant as "Mr. Doe." Mr. Doe came forward with helpful information to law enforcement. At first, Mr. Doe didn't ask for any consideration for his cooperation. At some point Mr. Doe was involved in a "VOP" (violation of parole) or a second-degree burglary, "or something[,] at some later point he got some benefit. Blansett could not remember whether the benefit occurred during or after trial.²⁷ The case in which Mr. Doe testified had initially resulted in Gonzalez' first degree murder conviction in 1985 or 1986, but was reversed on appeal. On remand, Blansett assigned the matter to SJDA Deputy Platt, and directed Platt to dispose of the matter as a voluntary manslaughter, due to witness problems. Gonzalez accepted the offer and pled guilty to manslaughter. HRT 1795-97 [Blansett].

Subsequently, Mr. Doe himself was prosecuted in a two strike case. The SJDA offered to allow Mr. Doe to plead guilty to only one of the strikes, but Mr. Doe refused the deal and ended up being convicted at trial with both strikes alleged, and getting a 25-to-life sentence. HRT 1797-98 [Blansett].

The SJDA's offer to allow Mr. Doe to plead guilty to only one strike came about:

because he had helped me in a homicide and because I knew it, I went to the deputy handling the case and said, 'Why don't you offer this guy to plead to this one and not allege both strikes.'

And I happened to be in court on one occasions [sic] when -- when the guy was in court and *I had a brief conversation with him to*

²⁷

Blansett testified that the prosecution made no promises of benefits to Mr. Doe at the time Mr. Doe testified. Blansett thought that Mr. Doe may have received a minor benefit nonetheless. HRT 1807 [Blansett].

1 *show him that I remembered him and told him I appreciated what*
2 *he had done in that other case. And didn't mention anything, just*
3 *said that I -- it wasn't my case, if I remember correctly at that time,*
4 *but wished him well. And then I went to the deputy and said, 'Why*
5 *don't you offer him this.'*

6 HRT 1797-98 [Blansett] (emphasis added).

7 To Blansett, it seemed like the right thing to do. HRT 1798 [Blansett].

8
9 **I. Admission of Non-Disclosed, Post-Testimonial Consideration**
10 **For Informant George.**

11 SJDA Deputy Blansett testified that he was once in the "working stages" with a
12 Mr. George, who tried to be an informant in one of Blansett's homicide cases.²⁸ George missed
13 an appointment with Blansett because George had been arrested. Thereafter, George was in the
14 Calaveras County Jail, and began calling Blansett "too frequently," trying to get back in
15 Blansett's "good graces." HRT 1810-11 [Blansett]. The fact that the man was suddenly calling
16 Blansett frequently from the Calaveras County Jail did not cause Blansett to distrust George's
17 information. HRT 1824 [Blansett].

18 Additionally, George called Blansett on a separate occasion. George's parole had
19 been violated, "and he wanted me to do something about it." George thought he was going to
20 serve a ninety day term, but instead the term was set for nine months. Blansett thought there
21 might have been a mistake made, so Blansett called the parole officer, who said he would look
22 into it. Blansett testified that no one ever got back to Blansett, and George stopped calling, "[s]o
23 whatever the problem was must have been taken care of." HRT 1848-49 [Blansett].

24 //

**J. Admission of Non-Disclosed, Post-Testimonial Consideration
For Informant *Leonard Samuels*.**

SJDA Deputy Blansett testified that Leonard Samuels, an informant, testified as a prosecution witness in the *Emmett McCaskell* case. Blansett testified that he thought no consideration had been given the informant, but SJDA Deputy Blansett found out in the middle of the trial that the prosecution "in fact had done something for this guy, much to my chagrin." HRT 1794 [Blansett].

**K. Admission of Non-Disclosed, Post-Testimonial Consideration
For Informant *George Heidenreich*, in the *Maahs* Case.**

SJDA Deputy Blansett testified that George Heidenreich was a prosecution witness in Blansett's *Robert Maahs* murder case. Deputy Blansett testified that Mr. Heidenreich's wife contacted Blansett later after Heidenreich had testified, but just to tell Blansett about their lives, not to ask for benefits. HRT 1809-10 [Blansett].

SJDA Deputy Blansett testified that everything the prosecution did for Heidenreich was put on the record in the *Maahs* case. HRT 1833 [Blansett]. However, Deputy Blansett also testified that, later, Heidenreich came back with a "felony DUI [driving under the influence]." Blansett "personally handled the case." HRT 1833 [Blansett].

And I handled the case to make sure that George did not go to state prison. [¶] And it was just sort of an after-the-thought thank you for his being a part of my trial and being such a good witness.
But it was nothing that was ever bargained with George Heidenreich. It was something I just did on my own.

HRT 1836 [Blansett] (emphasis added).

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1 **4. Former SJDA Deputy Van Oss' Testimony Establishes the Existence**
2 **of San Joaquin Law Enforcement's Practice of Providing Post-**
3 **Testimonial Consideration to Cooperating Prosecution Witnesses.**

4 **A. Deputy Van Oss' Practices and Perceptions Regarding**
5 **Informant Witnesses.**

6 SJDA Deputy Van Oss prosecuted around thirty or more homicides, including
7 four in which the death penalty was sought in the penalty phase; two of those four involved
8 defendants Blufford Hayes and Patrick Gordon. HRT 1988-89 [Van Oss]. SJDA Deputy Van
9 Oss saw informant witnesses as falling into one of several types: accomplices, underworld
10 figures, and persons who receive the defendants account and betray the confidence, such as jail-
11 house informants. HRT 2001-02 [Van Oss].

12 SJDA Deputy Van Oss believed he may have used the underworld figure type of
13 informant witness in as many as one third of all the homicides he had prosecuted. HRT 2003-05
14 [Van Oss]. He used such underworld figure informants in at least two death penalty cases. HRT
15 2004 [Van Oss]. He had also used at least two jailhouse informants in death penalty cases, Billy
16 Ray Culbert in the *Patrick Gordon* case, and another jailhouse informant in the *Blufford Hayes*
17 case. HRT 2007, 2076 [Van Oss]. He may have used jailhouse informants in other cases as
18 well. HRT 2007-08 [Van Oss].

19 Van Oss testified that jailhouse informants never asked him for any major benefit
20 in consideration of their testimony, such as time off a sentence or money. SJDA Deputy Van
21 Oss believed that he had categorically turned down jailhouse informants who asked for major
22 consideration for their efforts. HRT 2017, 2066-67, 2069 [Van Oss].

23 Former SJDA Deputy Van Oss testified to believing it was important to make sure
24 the informant was telling the truth, to verify the accuracy of the informant's testimony, to
25 investigate an informant witness' background and prior testimony, and what their experience had
26 been with other police officers, district attorneys, and judges. He would not use an informant
27 who had been proven to be a liar in the past. It was important to investigate the informant
28 witness that way, regardless of the jurisdiction from which the informant came. HRT 2008,

1 2015-16, 2071 [Van Oss]. He was aware of the negative publicity and scandal that arose in the
2 late 1980's concerning informant witnesses who were housed in the LACJ, but believed he
3 anticipated the problem of jailhouse informants acquiring information from police reports
4 through the questioning that used to make sure they didn't have access to police reports in the
5 defendant's possession. HRT 2009-11 [Van Oss].

6 SJDA Deputy Van Oss did not tape-record initial interviews with potential
7 informant witnesses. HRT 2011 [Van Oss]. Van Oss testified that he had no bad experiences
8 with informant witnesses, because he never caught one lying, or suspected one was lying. HRT
9 2013 [Van Oss]. Van Oss believed that jailhouse informant witnesses were the weakest type of
10 informant to use, and was much more careful with them than other types of informant witnesses.
11 HRT 2013-14 [Van Oss].

12
13 **B. Admission of Non-disclosed Post-Trial Testimony for Andrew**
14 **James in *Hayes*' capital conviction:**

15 In *People v. Hayes*, a capital murder case, Deputy Van Oss made a secret
16 agreement to provide post-testimonial benefits to a prosecution witness in a capital case, and did
17 not disclose the matter to the defendant. Van Oss called Andrew James as a prosecution witness,
18 who had a bad criminal record and a pending criminal case of his own (HRT 2018 [Van Oss]),
19 which put James within Van Oss' definition of an "underworld" informant witness (HRT 2001-02
20 [Van Oss]), or "citizen-type informant witness." HRT 2018-19 [Van Oss].

21 James received prosecution benefits in view of his testimony for the prosecution
22 in *Hayes*, i.e., SJDA Deputy Van Oss dismissed a felony criminal case against James which had
23 been pending during the *Hayes* case.²⁹ HRT 2019 [Van Oss].

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27 That case was *People v. Andrew James*, San Joaquin Municipal Court No. F27028, in
28 which James was facing allegations of violating sections 459, 666, and Health and Safety Code
sections 11550 and 11364.

1 SJDA Deputy Van Oss' "whole goal was never to tell the informants they were
2 going to get anything, I never would tell them that so they wouldn't have to say such a thing. So
3 my goal was never to tell them that." HRT 2081 [Van Oss]. "That's my clear cut rule." HRT
4 2086 [Van Oss].

5 In the *Hayes* case, SJDA Deputy Van Oss made an agreement with counsel for a
6 prosecution informant witness, under which the informant, Andrew James, would receive
7 consideration after he testified for the prosecution against Hayes in a capital case. SJDA Deputy
8 Van Oss did not disclose this consideration to Hayes' lawyers.

9 Bernard Gordon's Exhibits In Support of Petitioner's Denial, etc., Ex. 10, at page
10 1, an entry dated February 7, 1980, states:

11
12 D [defendant Andrew James] prime prosecution wit[ness] in
13 Bluford Hayes 187. He testified at Px [preliminary examination]
14 today after grant of immunity. [SJDA Deputy] Van Oss sd [said]
15 didn't want to make deal on this case on record but will guarantee
16 that D's OR will be reinstated. He wants to keep case felony for
17 now so if D splits they can extradite. After Hayes over, D can PG
18 [plead guilty] to misd[emeanor] for straight prob[ation] -- no jail.
19 Case is to be kept in Px ct [court] and kicked along w/ D's
20 appearance being excused (waiver of appearance filed for D). [Sic.]

21 In the same exhibit, an entry dated "10/16" states: "Case will be disposed of after
22 Hayes trial." *Id.* Entries on the following page show two continuances, followed by a
23 "dism[issal]." *Id.* at 2. The next following page includes the case number, and charges
24 pending against James, and a note in bold handwriting:

25 NOTE: D.A. recc. [recommends] O.R. on this [SJDA Deputy]
26 Van Oss is guy to see. This guy is a witness against Bluford Hayes
27 on the 187 p.c. at the Rice Motel on 1-1-80. THIS IS SECRET

28 //

1 INFO!! Don't tell the client, or let the word out, or this guy will be
2 a goner!! JTP. [Sic.]

3 *Id.* at 3.
4

5 Judge Van Oss³⁰ examined the exhibit, and agreed that the notes of Andrew
6 James' attorneys are correct; Van Oss believes he must have made the statements so documented
7 to James' attorneys. HRT 2032-35, 2081, 2085-86, 2098 [Van Oss]. Van Oss emphasized that
8 the notes made by James' attorneys in this exhibit indicated that SJDA Deputy Van Oss
9 specifically told the attorney not to tell James about the benefit James would receive after
10 testifying. HRT 2081 [Van Oss]. Judge Van Oss was at a loss to explain how he had failed to
11 disclose the matter to Hayes' lawyers. HRT 2086 [Van Oss].
12

13 **C. Billy Ray Culbertson.**

14 Out of county jailhouse informants testified at both Patrick Gordon's capital trial,
15 and Bernard Gordon's final capital trial. Jailhouse SJDA Investigator Dillon was the SJDA
16 investigating officer in both cases, and Dillon debriefed the informants in both cases, and Dillon
17 took care of arranging much of the informant's consideration in both cases. HRT 692-93, 698-
18 700 [Dillon], 2046-48 [Van Oss].
19

20 **1. Consultations During Bernard Gordon's Trials.**

21 SJDA Deputies Van Oss and Platt discussed Bernard Gordon's case while SJDA
22 Deputy Platt was prosecuting the case, including issues and strategy. SJDA Deputy Van Oss
23 conceded that they may have discussed the informant witness in Gordon's final trial, Mark
24 Mikles. HRT 2039 [Van Oss]. SJDA Deputy Van Oss provided information about Mikles, and
25 Mikles' involvement in Gordon's second case, to the CDC on at least two occasions, September
26

27
28 ³⁰

Van Oss now also is a Superior Court Judge in San Joaquin County.

1 10, 1987, and January 9, 1989. HRT 2040-42, 2044-45 [Van Oss], HEx 16, 18. On September
2 11, 1987, an internal SJDA memorandum was addressed to SJDA Deputy Van Oss in the severed
3 case of Gordon's co-defendant, Michael Caputo. HRT 2042-44 [Van Oss], HEx 17.

4
5 **2. SJDA Deputy Herrell's Testimony Establishes the**
6 **Existence of San Joaquin Law Enforcement's Practice**
7 **of Providing Post-testimonial Consideration to**
8 **Cooperating Prosecution Witnesses, Mark Mikles'**
9 **Knowledge Thereof, Mikles' Expectation of Receiving**
10 **Such Consideration for His Testimony, and Mikles'**
11 **Receipt of Such Consideration.**

12 William Herrell had been employed by the SJDA (HRT 1676-77 [Herrell]) since
13 1982. He had prosecuted three homicide cases at trial, and had participated in the preparation
14 and negotiation on three or four more; none were capital, and he had not been a member of the
15 homicide team. HRT 1677 [Herrell].

16 As discussed, *ante*, SJDA Deputy Herrell represented the People in *People v.*
17 *Kikume*, San Joaquin Superior Court No. 37300, which was tried in May and June, 1987. HRT
18 1678-79 [Herrell]. SJSD investigator Rosenquist was called by the CDC SSU's Don Hill on or
19 about May 6, 1987, concerning Mark Mikles; on May 8, 1987, Mikles and Rosenquist spoke on
20 the telephone.

21 During the *Kikume* trial, on May 27, 1987, SJDA Deputy Herrell attempted to call
22 Mikles as a witness, but the testimony was excluded under Evidence Code section 352. HRT
23 1713-14 [Herrell]. Many of the *Kikume* prosecution witnesses were prison inmates, and many of
24 them received consideration for their testimony. HRT 1682 [Herrell]. Herrell testified that
25 Mikles asked only for toiletries in exchange for his offer to testify. HRT 1731-32 [Herrell].
26 However, Mikles testified that he had never been a "petty informant," i.e., did not provide
27 information in exchange for trivial benefits such as beverages, food (HRT 1544 [Mikles]), or
28 presumably, toiletries. If Mikles did make that request of Herrell, Mikles nonetheless had an
expectation of greater rewards later.

1 SJDA Deputy Herrell also represented the People in *People v. Madden*, San
2 Joaquin Superior Court No. 37419A, and Mikles also testified as a prosecution witness at trial,
3 on November 23, 1988. HRT 1739-41 [Herrell]; 11/23/88 Minute Order, *People v. Madden*
4 [Mikles testified as prosecution witness], attached to HEx 34 [Schick]; *id.*, HEx 34 ¶ 5 [Schick].

5 SJDA Deputy Herrell testified that toiletries were all Mikles received for *Kikume*,
6 although Mikles asked that a letter be written, as a benefit for Mikles' testimony in *Madden*.
7 HRT 1732 [Herrell]. Similarly, SJSD Officer Rosenquist testified that he believed that Mikles
8 asked for nothing for testifying in the Johnson case, and that made Mikles a good witness,
9 because Mikles could testify that no deal had been made for Mikles' testimony. HRT 605
10 [Rosenquist].
11

12
13 **3. SJDA Deputy Herrell Did Not Believe That Any Post-**
14 **testimonial Letters Which He Wrote on Behalf of**
15 **Prosecution Witnesses Constituted Consideration for**
16 **Those Witnesses' Testimony.**

17 SJDA Deputy Herrell had a standard letter which he sent to the BPT on behalf of
18 inmates who testified as prosecution witnesses. He did this because the inmate manual issued by
19 the CDC said such inmates could receive up to one year off their sentences. HRT 1694, 1698
20 [Herrell]. It was his personal policy to write such letters whenever an inmate testified in another
21 inmate's case. HRT 1752 [Herrell]. Herrell did not feel that inmate witnesses came forward and
22 testified for the purpose of a possible one-year sentence reduction. HRT 1712 [Herrell]. He
23 could not remember ever clearing such a letter with anyone in his office, although he sometimes
24 discusses such letters with the SJDA investigating officer on the case. HRT 1737 [Herrell].

25 SJDA Deputy Herrell believed that his own letters were a consideration that the
26 BPT gave to inmates who testified in prison type crimes. HRT 1752 [Herrell]. However, SJDA
27 Deputy Herrell did not believe that post-testimonial letters which he wrote on behalf of prison
28 inmate witnesses constituted his consideration for the inmate witness' testimony. SJDA Deputy
Herrell believed that such letters were written pursuant to procedures that inmates had, and

1 procedures that penal institutions had adopted to encourage inmates to testify, because the
2 institution could reduce an inmate's sentence by one year for such testimony. He believed that
3 the letters he wrote merely advised the institution that the inmate witness had accomplished "that
4 step." HRT 1701 [Herrell].

5 SJDA Deputy Herrell did not keep copies of the letters that he wrote for his
6 personal reference; he could only guess at the number he had written. HRT 1738 [Herrell].
7

8 **4. SJDA Deputy Herrell Wrote At Least Five Undisclosed**
9 **Letters For Inmate Witnesses, Seeking Benefits For The**
10 **Witnesses After They Testified.**

11 SJDA Deputy Herrell did not provide copies of the five or six post-testimonial
12 letters he wrote to the CDC on behalf of inmate witnesses, to defense counsel in any of the
13 underlying cases. HRT 1706-07 [Herrell]. Herrell wrote such a letter for inmate witness, Kenny
14 Dawson, although Herrell had no agreement to do so with Dawson before Dawson's testimony at
15 the *Griffen* trial. Dawson may not have even requested the letter; Herrell may have written it on
16 his own initiative. HRT 1695, 1763 [Herrell]. Dawson got a one year reduction in sentence
17 (HEX. 14 [Sacramento Bee, 7/4/89, at B-1]), based on a letter written by Herrell. HEX. 14
18 [Sacramento Bee, 7/4/89, cont. on B-3]; see HRT 1695 [Herrell].³¹

19 SJDA Deputy Herrell testified that he did not have agreements with any of his
20 *Madden* inmate witnesses about writing these type letters at the time the inmates testified. HRT
21 1755 [Herrell].
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26 ³¹

27 Herrell claimed that Dawson received no reduction in sentence in response to Herrell's
28 letter. HRT 1696. Herrell claimed that he had not been interviewed by the Sacramento Bee, and
claimed that his memory was not refreshed by reading the newspaper article in which he is
quoted. HRT 1696-98, re: HEX. 14.

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5. SJDA Deputy Herrell Wrote At Least Two Such Undisclosed Letters For Mark Mikles After He Testified.

SJDA Deputy Herrell maintained that he was not aware of other SJDA Deputies writing letters on behalf of inmate witnesses, similar to letters he wrote for Mikles. Herrell discussed two letters he wrote on Mikles' behalf with SJSD Officer Rosenquist, although Herrell did not clear the letters with anyone in the SJDA Office. HRT 1737 [Herrell].

Neither letter was disclosed to Larry Madden's counsel, John Schick, nor were they put in any central informant file within the SJDA's Office. HEx. 34 ¶ 7 [Schick].

6. The November 23, 1988, Letter to the BPT, Discussed Mikles' Offering to Testify in *Kikume*, but Was Actually Written in View of Mikles' Madden Testimony.

Mikles contacted SJDA Deputy Herrell and asked that Herrell let the BPT know that Mikles "had testified in a case." HRT 1724 [Herrell]. Herrell could not remember whether Mikles contacted him personally about writing the letter, or whether it was through an investigator.³² HRT 1743, 1764 [Herrell]. However, "B. Herrell" is listed in Cheryl Mikles' address book, with an area code 209 telephone number (HEx. 20, at attachment 000012), as is "P. Rosenquist," also with an area code "209" number (HEx. 20, at attachment 000024), and "Pete Rosenquist," at the same area code "209" number. HEx. 20, at attachment 000042. "Rosenquist" also appears in a single bracket with "Hill," on a single page also listing Deputy Harriman, a telephone number, "9:30 5-15-87", followed by "Jack Dillon" and an area code "209" number. HEx. 20, at attachment 000045.

32

Rosenquist claimed he believed Mikles had gotten "nothing" for Mikles' information and testimony in the Johnson case, and testified that he had not seen any of the letters which Herrell wrote for Mikles, nor discussed them with Herrell, nor seen similar letters by Platt. HRT 605-06 [Rosenquist].

1 Eighteen months after Mikles' testimony was excluded in *Kikume*, on November
2 23, 1988, SJDA Deputy Herrell wrote a letter to the BPT, seeking consideration for Mikles,
3 theoretically in view of Mikles' willingness to testify in the *Kikume* matter. HRT 1733 [Herrell],
4 HEx 5 [Herrell 11/23/88 letter]. However, the letter was dated November 23, 1988, the very day
5 that Mikles also testified as a prosecution witness at the trial of Kikume's former co-defendant,
6 Larry Madden, with Herrell again representing the People. The November 23, 1988 letter for
7 Mikles was simply worded so as to allow SJDA Deputy Herrell to later argue it was not
8 consideration for Mikles' *Madden* testimony, and the letter therefore did not have to be disclosed
9 to Madden's counsel. The date of the letter and the date of Mikles' *Madden* testimony make this
10 clear.

11
12 Herrell could not remember ever clearing such a letter with anyone in his office.
13 HRT 1737 [Herrell].

14 Deputy Herrell did not provide copies of either of these two letters he wrote, dated
15 November 23, 1988, and February 16, 1989, to Mr. Schick, or any other defense counsel in any
16 other case in which he wrote such letters. HEx 34 ¶ 7 [Schick]), HRT 1706-07.

17
18 **7. The BPT Rejected SJDA Deputy Herrell's Request,**
19 **Because Mikles was a "Professional Informant" Who**
20 **Was "Manipulating the Criminal Justice System."**

21 BPT Executive Officer Robert Patterson, in his December 2, 1988, response, sent
22 to SJDA John Phillips, wrote that Mikles had already "received modification of his Return To
23 Custody Term" HEx 22 [Bybee declaration], attachments, 12/2/88 Patterson letter to SJDA
24 Phillips; HEx 24, ¶ 2-4 [Patterson declaration]. Patterson also wrote that the BPT would not
25 reduce Mikles' term again, because Mikles had "become a 'professional informant' and
26 manipulates the criminal justice system to avoid being held accountable for his negative
27 behavior." The letter was copied to the Long Beach Parole Office. *Id.*; see HRT 1735 [Herrell].
28

8. **Thereafter, on February 16, 1989, Herrell Sought
Consideration For Mikles Again, in Writing to CIM.**

On February 16, 1989, SJDA Deputy Herrell wrote a "to whom it may concern" letter to the CDC's CIM-Chino, seeking that Mikles' sentence be reduced in view of his *Madden* testimony. HEx. 34 [Schick declaration], attachments, 2/16/89 Herrell letter. The letter was not disclosed to Madden's counsel. HEx. 34 ¶ 7 [Schick declaration]. Herrell cannot remember why he wrote the letter, and his recollection was not refreshed by reading Mr. Patterson's December 2, 1988, letter to SJDA Phillips, implicitly rejecting SJDA Deputy Herrell's November 23, 1988, letter to the BPT. HRT 1736 [Herrell]. Herrell also cannot remember whether Mikles contacted him about writing the letter, or how he knew to write to Chino. HRT 1743 [Herrell].

2. **The Prosecutor Has a Duty to Learn of Any Favorable Evidence Known to Others
Either: Acting on the State and Government's Behalf; or to Whom the Prosecutor
Has Reasonable Access, Including Police, and the Failure to Obtain and Disclose
Such Information Is Attributable to the Prosecution, per *Kyles*, *Kasim*, and *Pitts*.**

The prosecutorial duty to disclose includes not just such evidence in the prosecutor's possession, but also such evidence possessed by investigative agencies to which the prosecutor has reasonable access. *People v. Kasim*, 56 Cal. App. 4th 1360, 1380 (1997) (citing, *inter alia*, *People v. Robinson*, 131 Cal. App. 4th 494, 499 (1995); *Pitchess v. Superior Court*, 11 Cal. 3d 531, 535 (1974).

[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady* . . . [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997).

1 Here, the prosecutor had "reasonable access" to his own office, San Joaquin law
2 enforcement, the CDC and Los Angeles-area law enforcement officers with whom Mikles, a
3 1982, 1984 and 1985 San Joaquin County Jail resident and snitch witness and a Los Angeles
4 County Jail resident and snitch witness, had plied his informant trade in the past.³³

5 "[A] prosecutor cannot adopt a practice of see-no-evil and hear-no-evil. . . .,"
6 particularly where the prosecutor knows the informant witness has obtained benefits for prior
7 cooperation with law enforcement. *People v. Kasim*, 56 Cal. App. 4th at 1386. Notably, the
8 California Supreme Court recently has re-affirmed the principle that district attorneys represent
9 the State of California -- and act as State officers when preparing to prosecute and prosecuting
10 violations of State law -- not just the County in which the case is brought. Furthermore, all
11 California district attorneys are directly supervised by the Attorney General in all matters
12 pertaining to the duties of their office. *Pitts v. County of Kern*, 17 Cal. 4th 340, 363 (1998)
13 (citing *inter alia* Cal. Con., art. V, § 13).

14
15
16 **A. Failure to Disclose an Informant Witness' Subjective Expectations of**
17 **Leniency, and Related Facts, Is a Due Process Violation, Even Apart**
18 **from Any Specific Promise by Law Enforcement, per *Malone, Giglio,***
19 ***Jimenez, and Shaffer*.**

20 The failure to disclose an informant witness' subjective expectations of leniency,
21 and any related facts, is a due process violation, even if there were no specific promise by law
22 enforcement. In *In Re Malone*, 12 Cal. 4th 935, 954, 963 (1996), the California Supreme Court
23 upheld the referee's finding that a due process violation occurred, in the prosecution's failure to
24 disclose that its informant witness testified in *Malone*, and other cases, in the "hope and
25 expectation" of receiving benefits from police and prosecutors, and the informant witness knew
26 no direct promises could be made to him. *Id.*

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Furthermore, a court may order that a local prosecutor provide even *state wide discovery*,
where the data sought may be compiled from information readily available to the district
attorney. *People v. Coyer*, 142 Cal. App. 3d 839, 842-43 (1983).

1 Post-testimony, non-disclosed snitch compensation relates backwards in time, and
2 reveals the informant's expectations of compensation at the time he testified, and whether he was
3 motivated to lie. *Id.* at 963; *see also In Re Earl Lloyd Jackson*, 3 Cal. 4th 578, 594 (1992),
4 *overruled on other grounds, In re Sassounian*, 9 Cal. 4th 535, 545 (1995); *People v. Phillips*, 41
5 Cal. 3d 29, 46-47 (1985). This is so because, even if the State has no explicit agreement with the
6 informant witness, "facts which imply an agreement would also bear on [his] credibility and
7 would have to be disclosed." *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986)
8 (emphasis added).

9 The United States Supreme Court made the same holding long ago, in *Giglio v.*
10 *United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), when it stated that,
11 "where the credibility of a witness is an important issue in the case, 'evidence of any
12 understanding or agreement as to a future prosecution would be relevant to his credibility and the
13 jury is entitled to know of it." (Emphasis added). Furthermore, the error in failure to disclose
14 *facts regarding such understandings* is exacerbated, when -- as here -- the jail house informant's
15 testimony "was at best inaccurate and at worst perjury." *Jimenez v. State*, 918 P.2d 687, 694
16 (Nev. Sup. Ct. 1996) .

17 It is "well established" that "... the defense is entitled to elicit evidence that a
18 witness is motivated by an expectation of leniency or immunity ..." ([*People v. Dyer*, 45 Cal. 3d
19 26, 49 (1988)] and that it is the witness' *subjective expectations*, not the objective bounds of
20 prosecutorial influence, that are determinative. *People v. Coyer*, 142 Cal. App. 3d 839, 843
21 (1983). That is *precisely* the nub of the LACJ snitch system: law enforcement enacted a secret
22 snitch deal, or even a tacit, but unspoken deal, so that an individual prosecutor wouldn't know
23 about the deal until *after* trial, at the time of the pay-off. *The secret snitch system was so created*
24 *to avoid disclosing devastating impeaching evidence to defendants.*
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1 It is precisely such an understanding of the "informant system," and the benefits
2 which must inevitably flow to the informant for cooperation, that SJDA Deputy Blansett
3 repeated to one would-be informant, in lieu of making any formal deal. HRT 1804-05 [Blansett].
4

5 **B. An Informant's Activity in Other Cases Is Relevant to the Informant's**
6 **Practice, Plan, Motive and Expectation of Benefits, per *Malone*.**

7 An informant's activity in other cases is relevant to the informant's practice, plan,
8 motive and expectation of benefits for informing generally. This is particularly so where the
9 evidence established that the informant's accounts in other cases of other confessions were
10 fabricated or demonstrably false. *In Re Malone*, 12 Cal. 4th at 946-47, 959, 963.
11

12 **C. The SJDA Use of Informants With a Pattern of False Informing and**
13 **Fabrication of Confessions in Other Cases Is Relevant to this Court's**
14 **Determination of Whether Samuelson Fabricated His Account of**
15 **Petitioner's Confession, per *Malone*.**

16 An informant's pattern of false informing and fabrication of confessions in other
17 cases is relevant to this Court's determination of whether Mr. Mikles fabricated his account of
18 petitioner's confession. *In Re Malone*, 12 Cal. 4th at 957-59, 963.
19

20 **D. An Informant's Delay in Disclosing an Alleged Confession Is Relevant**
21 **to this Court's Determination of Whether Samuelson Fabricated His**
22 **Account of Petitioner's Confession, per *Malone*.**

23 An informant's delay in disclosing an alleged confession is relevant to this Court's
24 determination of whether Samuelson fabricated his account of petitioner's confession. *In Re*
25 *Malone*, 12 Cal. 4th at 961-62. A delay of even one year is "especially probative." *Id.* at 962-63.
26 To date, the delay in this case has been 16 years.
27
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1 **E. The Court May Consider Circumstantial Evidence of Law**
2 **Enforcement's Implied Promises of Consideration for an Informant's**
3 **Cooperation, and Performance of Such Implied Promises, Even When**
4 **Law Enforcement Denies Having Promised or Provided Any**
5 **Consideration, per *Malone*.**

6 The court may consider circumstantial evidence of law enforcement's implied
7 promises of consideration for an informant's cooperation, and performance of such implied
8 promises, even when law enforcement denies having promised any consideration. *In Re Malone*,
9 12 Cal. 4th at 951, 963. This is so even when a deputy district attorney denies under oath having
10 provided such consideration by making recommendation to other law enforcement officers. *Id.*
11 at 952, 963. An experienced informant is extremely likely to understand that he would receive
12 no direct promises of benefits from law enforcement at the time he provided his testimony, but
13 would receive such benefits later, if his testimony satisfied law enforcement. *See id.* at 953-54,
14 963. "Actions speak louder than words." *Id.* at 953 (emphasis added); *see also id.* at 963.

15 **F. The Court May Consider Circumstantial Evidence of an Informant**
16 **Having the Opportunity to Fabricate Testimony by Reading Police**
17 **Reports, Having Conversations with Other Inmates and Law**
18 **Enforcement Officers, and Reading Newspaper Articles about a**
19 **Defendant's Case, per *Malone*.**

20 The court may consider circumstantial evidence of an informant having the
21 opportunity to fabricate testimony by, *inter alia*, reading police reports, having conversations
22 with other inmates and law enforcement officers, and reading newspaper articles about a
23 defendant's case. *In Re Malone*, 12 Cal. 4th at 954-57. *See* Claim 5.

24 **G. The Prosecution Has a Continuing Duty of Disclosure Regarding**
25 **Material, Impeaching Evidence and False Testimony.**

26 The federal constitutional duty of prosecution team - or state - disclosure of
27 material, impeaching evidence or false testimony continues *after* trial, after conviction and on
28 appeal, and during habeas corpus proceedings, even absent a defendant's request for such

1 disclosure (*People v. Kasim*, 56 Cal. App. 4th at 1383-84, and cases cited therein) as does the
2 prosecutor's ethical duty of disclosure. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25, 96 S. Ct.
3 984, 47 L. Ed. 2d 128 (1976).³⁴

4 5 CONCLUSION

6
7 During the 1980s, the San Joaquin County District Attorneys office regularly and
8 systematically employed unlawful and unconstitutional practices not dissimilar from those used
9 in Los Angeles County with respect to informants and snitch jail house informants, and it
10 instituted such practices in this case. The SJDA created an environment wherein the
11 expectations for favors and lenient treatment were greater than the expectations of Dodger fans
12 during Spring training. This uncontrolled environment made informants and snitch jail house
13 witnesses become like *Pavlov's dogs* with the anticipation of rewards akin to L.A. valet parking
14 attendants. Gratuities, if not posted and agreed to in advance, were knowingly expected and
15 were freely and regularly made.

16
17 Petitioner submits that he has established the specific facts of lying, deceit, and
18 fabrication in exchange for undisclosed rewards with respect to the SJDA's use of jail house
19 snitch Samuelson in this case; he now also has presented abundant evidence, circumstantial and
20 otherwise, of the same unmonitored systemic procedure employed throughout the office during
21 the 1980s, and in particular, with respect to capitally charged cases.

22 For these reasons, petitioner respectfully requests that the court grant this motion
23 to alter the judgment in all respects and alter and/or amend the judgment granting relief with

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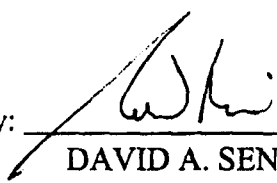
27 These duties continue as to both deputy attorney generals and trial prosecutors
28 [*People v. Garcia*, 17 Cal. App. 4th 1169, 1181-84 (1993)] and the entire prosecution -- or state -
- team.

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respect to Claims 4 through 7 in the first amended petition for writ of habeas corpus.

DATED: May 5, 1999

MCBREEN & SENIOR

By: 
DAVID A. SENIOR
EMILIE D. JUDD
Attorneys for Petitioner
MICHAEL ANGELO MORALES

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Los Angeles, California 90067
Telephone: (310) 552-5300

PROOF OF SERVICE

**Morales v. Calderon
Case No. CV 91-0682 DT**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1925 Century Park East, Suite 2200, Los Angeles, California 90067.

On May 5, 1999, I served the foregoing document(s) described as NOTICE OF MOTION AND MOTION TO ALTER AND/OR AMEND JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEROF on the interested parties in this action by placing [] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

**Keith H. Borjon, Esq.
Supervising Deputy Attorney General
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013
Fax No. (213) 897-2263**

[X] (By Mail): As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing in affidavit.

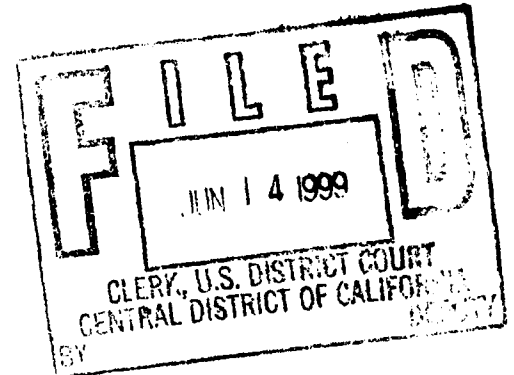
[] (By Facsimile): I caused such document to be faxed to the addressee at the fax number noted above.

[] (State): I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 5, 1999, at Los Angeles, California.


CYNTHIA KELLEY



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES,)	CASE NO. CV 91-0682-DT
)	
Petitioner,)	DEATH PENALTY CASE
)	
v.)	
)	
ARTHUR CALDERON, Warden of)	ORDER DENYING PETITIONER'S
California State Prison at)	MOTION TO ALTER OR AMEND
San Quentin,)	JUDGMENT
)	
Respondent.)	

Introduction

On April 21, 1999, the Court entered judgment in this case, denying petitioner Michael Angelo Morales's petition for a writ of habeas corpus. Pursuant to Federal Rule of Civil Procedure 59(e), on May 5, 1999, Morales filed a motion to alter or amend the judgment. The motion requests amendment of the judgment to grant relief on the basis of Claims 4 through 7 of the petition, which allege prosecutorial misconduct and ineffective assistance of counsel with respect to the testimony of Bruce Samuelson, a jailhouse informant who claimed that Morales made certain incriminating statements while the two were housed together in

1 the San Joaquin County Jail. Petitioner seeks reconsideration of
2 these claims on the basis of newly presented evidence concerning
3 the use of jailhouse informants by prosecutors in Los Angeles
4 County and San Joaquin County during the 1980's, when Morales's
5 trial took place.

6 Discussion

7 Federal Rule of Civil Procedure 59 applies to habeas corpus
8 proceedings, which are civil actions. Browder v. Director, Dept.
9 of Corrections of Illinois, 434 U.S. 257, 270-71 (1978). A
10 motion to alter or amend the judgment under Rule 59(e) is similar
11 to a motion for reconsideration. Schroeder v. McDonald, 55 F.3d
12 454, 458-59 (9th Cir. 1995). The motion must be filed within ten
13 days of entry of judgment. Fed. R. Civ. P. 59(e). The instant
14 motion is timely. Fed. R. Civ. P. 6(a).

15 "Under Rule 59(e), a motion for reconsideration should not
16 be granted, absent highly unusual circumstances, unless the
17 district court is presented with newly discovered evidence,
18 committed clear error, or if there is an intervening change in
19 the controlling law." 389 Orange Street Partners v. Arnold, __
20 F.3d __, 1999 WL 355959, at *16 (9th Cir. June 4, 1999); accord
21 School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir.
22 1993); cf. Local Rule 7.16 (motions for reconsideration).

23 The instant motion seeks reconsideration of the Court's
24 denial of Claims 4, 5, 6, and 7 of the petition. Those claims
25 are discussed in the Court's order of September 28, 1998, on the
26 parties' cross-motions for summary judgment. (See Order, Sept.
27 28, 1998, at 29-37.) Claims 4 and 5 allege that the prosecutor
28 at Morales's trial knew or should have known that Samuelson's

1 testimony was false, and failed to disclose to the defense
2 certain benefits conferred on Samuelson in exchange for his
3 testimony. Claim 6 alleges that the prosecutor effectively
4 employed Samuelson as a government agent by placing him in a cell
5 near Morales and instructing him to obtain incriminating
6 information. Claim 7 alleges that Morales's defense attorney
7 failed to provide constitutionally effective representation,
8 because he did not investigate evidence that could have been used
9 to impeach Samuelson. Petitioner's motion for an evidentiary
10 hearing and for discovery related to these claims was denied at a
11 hearing on June 29, 1998. The parties subsequently filed cross-
12 motions for partial summary judgment on these claims. On
13 September 28, 1998, the Court granted respondent's motion, denied
14 petitioner's motion, and denied Claims 4, 5, 6, and 7. (See
15 Order, Sept. 28, 1998, at 22-23, 93.)

16 In seeking reconsideration of these four claims, Morales
17 does not contend there have been any recent changes in the
18 applicable law. And although Morales has made it clear that he
19 disagrees with this Court's disposition of the claims, he does
20 not in the instant motion attempt to demonstrate that the Court
21 committed clear error in reaching that decision. Instead,
22 Morales argues that the Court should reconsider its denial of
23 these claims in view of "newly discovered facts reflecting the
24 habitual, repeated, and improper systemic use of snitch jail
25 house witnesses and informants in San Joaquin County during the
26 1980s" (Motion at 4.)

27 The "newly discovered facts" alleged by Morales are derived
28 from the following five sources:

1 (1) A report of the 1989-1990 Los Angeles County Grand Jury,
2 describing the use of informants in Los Angeles County from 1977
3 through 1988. As petitioner acknowledges, this report was
4 available in 1990. See, e.g., People v. Gonzalez, 51 Cal. 3d
5 1179, 1259 n.54 (1990).

6 (2) The California Supreme Court's opinion in In re Jackson,
7 3 Cal. 4th 578 (1992), upholding a state habeas corpus referee's
8 findings that in Jackson's trial, a Los Angeles County Deputy
9 District Attorney presented the testimony of a Los Angeles County
10 Jail inmate (Mark Mikles), which the prosecutor knew or should
11 have known was false. The court's opinion was published in 1992.

12 (3) The transcript of an evidentiary hearing held in 1996
13 and 1997 by the Fresno County Superior Court (sitting in San
14 Joaquin County) in In re Gordon. In re Gordon is a state habeas
15 corpus proceeding challenging a death judgment against Bernard
16 Gordon, who was capitally charged and jailed in San Joaquin
17 County in the early 1980's but tried in Fresno County after a
18 change of venue. The evidentiary hearing transcript contains
19 testimony about the use of informants by prosecutors in San
20 Joaquin County during the 1980's. Morales was aware of and had
21 access to this transcript in 1997.

22 (4) The Fresno County Superior Court's findings of fact and
23 conclusions of law in In re Gordon, filed February 23, 1999.

24 (5) A finding of fact in an order filed May 24, 1999, by the
25 Honorable David F. Levi of the United States District Court for
26 the Eastern District of California in Hayes v. Calderon, a
27 federal capital habeas corpus proceeding challenging a judgment
28 against Blufford Hayes by the San Joaquin County Superior Court

1 in the early 1980's. Morales represents that Judge Levi found
2 the prosecutor "failed to disclose a side deal for leniency" that
3 was provided to an informant, Andrew James. (Reply at 3.)

4 The vast majority of the facts alleged in the instant motion
5 for reconsideration were known or were readily available to
6 Morales before the briefing on the parties' cross-motions for
7 partial summary judgment on Claims 4 through 7 was completed, and
8 even before Morales filed his motion for an evidentiary hearing
9 on those claims. Morales relies principally on the testimony in
10 the Gordon evidentiary hearing, which occurred in 1996 and 1997.
11 Morales effectively concedes that he was aware of these facts
12 more than a year ago, before he filed his motion for an
13 evidentiary hearing. (See Reply at 2-3.) The only items
14 arguably constituting "newly discovered evidence" are the Fresno
15 County Superior Court's findings of fact in In re Gordon, filed
16 February 23, 1999, and Judge Levi's order in Hayes v. Calderon,
17 filed May 24, 1999, but these merely reiterate factual
18 allegations Morales makes elsewhere on the basis of his other
19 sources, all of which predate 1998.

20 Evidence is not considered "newly discovered" for purposes
21 of a Rule 59 motion if it was in the moving party's possession at
22 the time of the court's original decision on the matter or could
23 have been discovered with reasonable diligence. Coastal Transfer
24 Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir.
25 1987). "[T]he failure to file documents in an original motion or
26 opposition does not turn the late filed documents into 'newly
27 discovered evidence.'" School Dist. No. 1J, 5 F.3d at 1263.
28 Because Morales knew, or with reasonable diligence could have

1 learned, of all the evidence he now identifies in support of his
2 motion to amend the judgment, before his briefing on the cross-
3 motions for partial summary judgment was completed, he is not
4 entitled to reconsideration of the judgment at this late date.

5 Despite Morales's failure to present evidence that is
6 genuinely "newly discovered" within the meaning of the Federal
7 Rules of Civil Procedure, the Court has read and considered
8 Morales's new allegations. These allegations, even if true, have
9 nothing to do with the prosecutor or the jailhouse informant in
10 this case. Morales discusses numerous San Joaquin County
11 prosecutors, but says nothing about Bernard Garber, the
12 prosecutor in his case. Similarly, Morales discusses numerous
13 jailhouse informants from Los Angeles County and San Joaquin
14 County, but provides no evidence concerning Bruce Samuelson.
15 Morales occasionally asserts in a conclusory manner that
16 Samuelson is similar to another jailhouse informant about whom he
17 does make specific allegations. (See Motion at 13-15 & n.11
18 (Samuelson and Mikles both incarcerated at San Joaquin County
19 jail in 1982 and both "entered the scene shortly before trial");
20 id. at 16-17 (Mikles's testimony against Gordon similar to
21 Samuelson's testimony against Morales); id. at 34-35 ("informants
22 are a community and share information and expertise").) But
23 Morales identifies no concrete evidence implying that any
24 prosecutor or law enforcement agent committed misconduct with
25 respect to Bruce Samuelson.

26 Morales's discussion of the practices of San Joaquin County
27 prosecutors is similarly uninformative. He states that San
28 Joaquin County Deputy District Attorney Michael Platt, who

1 allegedly committed misconduct in other trials, "conducted the
2 initial investigation of petitioner's case and his co-defendant
3 [Rick Ortega's] capital case" (Motion at 14-15.)
4 Morales claims that Deputy District Attorney Terrence Van Oss,
5 who also allegedly committed misconduct in other trials, "also
6 worked" on the Morales case at some unidentified point. (Motion
7 at 15.) Beyond these two allegations - which establish nothing -
8 Morales does not even attempt to draw a connection between any of
9 the prosecutors he discusses and the particular facts of this
10 case.

11 In short, the evidence now offered by Morales in support of
12 Claims 4 through 7, even if it had been timely offered along with
13 the evidence alleged in support of Morales's original motions for
14 an evidentiary hearing and for partial summary judgment, and even
15 assuming it all to be true, does nothing to demonstrate that the
16 State knowingly presented false evidence or withheld material
17 impeachment evidence in Morales's trial. (See Order, Sept. 28,
18 1998, at 29-37 (discussing Claims 4 through 7).)

19 Conclusion

20 For the foregoing reasons, petitioner's motion to alter or
21 amend the judgment is hereby **DENIED**.

22 IT IS SO ORDERED.

23
24 Dated: JUN 14 1999

DICKRAN TEVRIZIAN

DICKRAN TEVRIZIAN
United States District Judge

25
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DECLARATION OF PATRICIA FELIX

I, PATRICIA FELIX, formerly known as Patricia Flores, hereby declare as follows:

1. I testified against Michael Angelo Morales at his capital murder trial. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would competently testify thereto.

2. On December 14, 2005, I spoke to David Ikeda, an investigator from the California Department of Justice. As I told Mr. Ikeda on that date, I had not been contacted by anyone working on behalf of Michael Morales. I told Mr. Ikeda that I had been concerned for my safety and agreed to call him if anyone associated with Morales tried to contact me. Even as of today, I have not been contacted by or spoken to anyone working on Morales's behalf.

3. On February 1, 2006, I met with Larry Ferrari and Rita Sharp, who also identified themselves as law enforcement agents working on the prosecution side of the Michael Angelo Morales execution. They interviewed me and the interview was tape recorded with my knowledge.

4. During the interview, Ferrari and Sharp showed me a declaration that I supposedly signed on January 25, 2006. They informed me that the declaration was submitted as an exhibit to Morales's clemency petition. The signature and initials on the declaration they showed me are not mine. Before Ferrari and Sharp showed it to me, I had never seen the declaration before. I did not provide the information contained in the declaration to anyone. And I have not met with or spoken to anyone working on Morales's behalf.

5. I have reviewed a transcript of my interview with Ferrari and Sharp, a copy of which is attached to this declaration, and it is completely accurate as to the statements I made to the investigators on February 1, 2006. All of the statements attributed to me in the transcript of the interview are truthful.

6. As I told the prosecution investigators on February 1, 2006, I never signed the January 25th declaration. I had never seen it before. I testified truthfully at Michael Morales's trial and I stand by my testimony. I was never coerced or threatened in any way by the police at the time of Morales's trial.

I declare under penalty of perjury of the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 2nd day of February 2006, in [REDACTED] California.

1 INTERVIEW BETWEEN DEPUTY CHIEF LARRY FERRARI, SAN JOAQUIN COUNTY
2 DISTRICT ATTORNEY'S OFFICE, SPECIAL AGENT RITA SHARP, DEPARTMENT OF
3 JUSTICE AND WITNESS PATRICIA FELIX

4 Special Agent Sharp: February 1, 2006 and in my presence I have Patricia Felix and also
5 Larry Ferrari. Time is approximately twenty minutes to five.

6 Deputy Chief Ferrari: Okay and for my tape recorder I'll do the same thing. The time is um,
7 four forty on uh, Wednesday February 1st, 2006. My name is Larry
8 Ferrari. I'm the Deputy Chief Investigator with the San Joaquin
9 County District Attorney's Office. I'm here with uh, Special Agent
10 Rita Sharp from the Department of Justice and also uh, Patricia Felix.
11 Patricia for the tape recorder will you please state your full name and,
12 and spell your last name and then give us your date of birth please.

13 Patricia Felix: Patricia Ann Felix. F-E-L-I-X. [REDACTED]

14 Deputy Chief Ferrari: Okay and what's your current address Patricia?

15 Patricia Felix: [REDACTED]

16 Deputy Chief Ferrari: Is there a phone number there where we can reach you?

17 Patricia Felix: Um, [REDACTED]

18 Deputy Chief Ferrari: Okay and also for the tape recorder we're at uh [REDACTED]
19 [REDACTED] Now Patricia before
20 we get started you and I met uh, for the first time about five minutes
21 is that accurate.

22 Patricia Felix: Correct.

23 Deputy Chief Ferrari: Okay and I introduced myself to you.

24 Patricia Felix: Correct.

25 Deputy Chief Ferrari: And I...did I tell you what the purpose of our visit was with you.

26 Patricia Felix: Yes.

27 Deputy Chief Ferrari: And were you uh, encouraged to tell the truth.

28 Patricia Felix: Yes.

Deputy Chief Ferrari: And uh, were you told uh, whether or not you were under arrest.

1 Patricia Felix: Yes.
2 Deputy Chief Ferrari: What did I tell you.
3 Patricia Felix: That I wasn't.
4 Deputy Chief Ferrari: Okay do you feel right now like you're here of, of your own volition
5 freely and voluntarily.
6 Patricia Felix: Yeah.
7 Deputy Chief Ferrari: Okay. Do you feel like if you wanted to you could get up and walk
8 out the door.
9 Patricia Felix: Yep (Laughter).
10 Deputy Chief Ferrari: Good, very good. Now I did...I bought you a soda correct.
11 Patricia Felix: Yes (Laughing).
12 Deputy Chief Ferrari: But I didn't make you any promises relative to that did I.
13 Patricia Felix: No.
14 Deputy Chief Ferrari: Okay and again just so we're clear if at any time if you decide you
15 know what I don't like these questions or I don't want to talk
16 anymore get up and you can leave okay.
17 Patricia Felix: Okay.
18 Deputy Chief Ferrari: You're free to go.
19 Patricia Felix: Alright.
20 Deputy Chief Ferrari: Okay. Rita before we start uh, do you want to add any comments.
21 Special Agent Sharp: No, um I...well just one thing um, you don't feel any way that you
22 were coerced to talk to us in any manner.
23 Patricia Felix: No.
24 Special Agent Sharp: Okay, okay.
25 Deputy Chief Ferrari: Rita what I have be, before is a declaration um, and I'll read it the
26 cover here and I'll show it to you. It's Exhibits and Support of
27 Petition for Executive Clemency Michael A. Morales. Exhibit 30 and
28 it says here declaration of Patricia Felix, January 25, 2006. Does,

1 does this document ring a bell.

2 Patricia Felix: No.

3 Deputy Chief Ferrari: Okay.

4 Patricia Felix: I don't recall giving a declaration on the 25th to anybody.

5 Deputy Chief Ferrari: Okay and that would have been, according to this document here

6 January 25th, 2006 so this year.

7 Patricia Felix: Correct.

8 Deputy Chief Ferrari: Very recently according to this date here.

9 Patricia Felix: Correct.

10 Deputy Chief Ferrari: Uh, I'm going to allow you to look at this and just read it on your own

11 but before we do that um, I'm going to well let's do that. I'll just, I'll

12 hand this to you and I'll let you look at it okay.

13 Patricia Felix: Okay.

14 Deputy Chief Ferrari: And, and you can read through it and make comments.

15 Patricia Felix: I, I never said that. No, this is...I never said that. That is one thing

16 I...that is not true I didn't say that. It says I recently found out in my

17 life in my whole outlook about myself has changed. I have never said

18 that. And I never said that I had to hustle and struggle just to keep my

19 family fed and clothed, that's not true. I have problems with several

20 men in my life no I have never gave this declaration and I don't know

21 who did. Mike never offered to take care of my kids when I was

22 gone. I never left him alone with my kids. He never was left alone

23 with my kids. And is that supposed to be my initials.

24 Deputy Chief Ferrari: I assume so.

25 Patricia Felix: No, I will initial something for you and show you that is not my

26 initials. No, I never gave this dec...this is...I don't know where they

27 got it from or who they got it from.

28 Deputy Chief Ferrari: Okay.

1 Patricia Felix: This is not mine.

2 Deputy Chief Ferrari: Okay just so we're clear Patricia and I'm not going to...we're not

3 going to force you to read through this whole thing...

4 Patricia Felix: Yeah I don't.

5 Deputy Chief Ferrari: I mean I, I actually I would, I would like you to but if you don't want

6 to...

7 Patricia Felix: Yeah.

8 Deputy Chief Ferrari: But if you don't want to...

9 Patricia Felix: Yeah.

10 Deputy Chief Ferrari: I'm not going to make you do that.

11 Patricia Felix: I mean this, this is just not...what...I, I never talked to nobody so why

12 would I...I mean there's things in here that I would have never said.

13 Deputy Chief Ferrari: Okay.

14 Patricia Felix: Never. I mean it's just unreal especially this thing about I found God.

15 The only God I find is I'd like to put my foot in my child,

16 grandchildren's rear end sometimes but...(Laughing).

17 Deputy Chief Ferrari: Okay.

18 Patricia Felix: That ain't to find it you know.

19 Deputy Chief Ferrari: So, so we're clear though you, you didn't talk to...either on the

20 telephone or in person...

21 Patricia Felix: No.

22 Deputy Chief Ferrari: Or in writing to anybody representing anybody...

23 Patricia Felix: No.

24 Deputy Chief Ferrari: That had to do with Michael Morales or Rick Ortega...

25 Patricia Felix: No.

26 Deputy Chief Ferrari: Relative to this case your testimony...the statements you've given

27 previously. I mean I..you seem like a very uh, smart woman with it

28 that you would remember if you would have talked to somebody.

1 Patricia Felix: Correct. No I...there is no way.
2 Deputy Chief Ferrari: Okay.
3 Patricia Felix: That I talked to anybody about this. This is just...I don't...
4 Special Agent Sharp: And you never provided your initials that you can recall on any uh...
5 Patricia Felix: No.
6 Special Agent Sharp: Form of this document. If I can have you look at the last page of the
7 document where there is a signature on the back page can you tell
8 me...
9 Patricia Felix: Nope that's not it.
10 Special Agent Sharp: If that's your signature.
11 Patricia Felix: No, it's not. Somebody tried to do my signature but they didn't do a
12 very good job of it.
13 Special Agent Sharp: Okay.
14 Deputy Chief Ferrari: Patricia is anybody that you're aware of [REDACTED] using
15 your name or, or...
16 Patricia Felix: You know what I don't know.
17 Deputy Chief Ferrari: Anybody that looks like you.
18 Patricia Felix: I...
19 Deputy Chief Ferrari: That to your knowledge.
20 Patricia Felix: I have no idea.
21 Deputy Chief Ferrari: Have you been a victim of an identify theft here recently as far as you
22 know.
23 Patricia Felix: Not that I know of. I mean I've had [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 Deputy Chief Ferrari: Okay. Has anybody attempted to contact you recently.
27 Patricia Felix: No.
28 Deputy Chief Ferrari: As far as you know.

1 Patricia Felix: That' why why I was so surprised because when I talked to uh,
2 David...
3 Special Agent Sharp: Ikeda.
4 Patricia Felix: Ikeda. When I talked to David over the telephone he had said that
5 there would be a possibility that somebody would try to contact me.
6 Special Agent Sharp: Uh huh.
7 Patricia Felix: From their side and I said well are they going to be able to find me
8 because you guys found me how, how am I guaranteed that they may
9 not.
10 Deputy Chief Ferrari: Right.
11 Patricia Felix: And he said that they just have the equipment to find me that
12 they...the other side [unintelligible] doesn't have not...would never
13 contact me and I said okay cool, went about my business that was it.
14 Deputy Chief Ferrari: Okay. Patricia if you wouldn't mind then I'm going to take you up on
15 your offer to...
16 Patricia Felix: Okay.
17 Deputy Chief Ferrari: To initial, put your initials here and then also...
18 Patricia Felix: Yeah.
19 Deputy Chief Ferrari: If you would sign your name like you normally would. And then if
20 you would please uh, date that.
21 Patricia Felix: Okay.
22 Deputy Chief Ferrari: Today's the...
23 Patricia Felix: Two one.
24 Deputy Chief Ferrari: Two one.
25 Patricia Felix: (Laughing).
26 Deputy Chief Ferrari: Okay. Rita I'll ask you to witness that and then I'll put my name in,
27 on there as well. Uh if, if you don't mind Patricia and I know this
28 might be painful for you but I'd like to go through and find some



1 excerpts in here...

2 Patricia Felix: Sure go ahead..

3 Deputy Chief Ferrari: That, that I'd like to show you specifically.

4 Patricia Felix: And I'll even show you my um, I you know cuz I mean I can just go

5 ahead and, and do that signature any old way but I mean I want you

6 to see on my ID also that's how I sign my name..

7 Deputy Chief Ferrari: Okay.

8 Patricia Felix: (Unintelligible). That's on my bank card.

9 Deputy Chief Ferrari: Okay. You showed us [REDACTED]

10 [REDACTED]

11 Patricia Felix: Correct.

12 Deputy Chief Ferrari: And there's a signature on there.

13 Patricia Felix: Correct.

14 Deputy Chief Ferrari: And you also showed us your, your bank card...

15 Patricia Felix: [REDACTED]

16 Deputy Chief Ferrari: From uh, [REDACTED]

17 Patricia Felix: Uh huh.

18 Deputy Chief Ferrari: [REDACTED]

19 Patricia Felix: (Unintelligible)...card number but...

20 Deputy Chief Ferrari: Okay.

21 Patricia Felix: Yeah.

22 Deputy Chief Ferrari: In, in the name of Patricia Felix and then on the back there's a

23 signature.

24 Patricia Felix: Correct.

25 Deputy Chief Ferrari: Okay thank you. I, I'm going to ask that you retain possession of

26 those items but we'll have a note of it here on the record.

27 Patricia Felix: Okay.

28 Deputy Chief Ferrari: Okay. Um, I'm going to refer you to page six of this declaration.

1 Allegedly or purportedly offered by you and specifically number
2 eighteen would you please read that and then, and then comment on
3 that.

4 Patricia Felix: In January 1981 Mike never put anything around my neck or
5 otherwise. That is untrue. I will never forget. I was sitting in the
6 kitchen at the table and he came up from behind me and he put a thin
7 belt around my neck and he said he was practicing. I never saw him
8 handle a belt, a hammer or a knife during that time which is untrue.
9 I, I'm not going to sit there and say something especially...you want
10 me to read num, number nineteen.

11 Deputy Chief Ferrari: Excuse me may I look at this for a second.

12 Patricia Felix: Sure.

13 Deputy Chief Ferrari: We'll, we'll move on to page seven.

14 Patricia Felix: Uh huh.

15 Deputy Chief Ferrari: And if you can read uh, starting uh, number twenty-two and if you
16 like you can read to yourself or you can read aloud, it's your choice.

17 Patricia Felix: Okay. That's okay I never looked for anything in the apartment that
18 night including a hammer or knife. I never got up to look at Rick's
19 car and I never had any further conversation with either him or Mike
20 that night. You know what I don't even remember, I never heard
21 Mike make any statements about anything having to do with killing
22 Teri Winchell. I never saw him wash the hammer or the knife that
23 night. Now I can't say, say that I did see him but I don't remember.

24 Deputy Chief Ferrari: Okay.

25 Patricia Felix: I mean that's just like a blank.

26 Deputy Chief Ferrari: Okay.

27 Patricia Felix: That um, that's just a total blank right there.

28 Deputy Chief Ferrari: Okay.

1 Patricia Felix: And I couldn't...uh, maybe I don't want to go back to that.
2 Deputy Chief Ferrari: Okay.
3 Patricia Felix: I don't know you know but I don't, but I...wouldn't...I never saw that.
4 Um, you want me to read number twenty-three.
5 Deputy Chief Ferrari: Yeah, real quick.
6 Patricia Felix: Sure.
7 Deputy Chief Ferrari: Yes, if you wouldn't mind read twenty-three and twenty-four.
8 Patricia Felix: Okay.
9 Deputy Chief Ferrari: Please.
10 Patricia Felix: I heard Rick say that Teri was gone and that the police might come
11 over. Nope. I didn't hear, I don't remember that.
12 Deputy Chief Ferrari: Okay.
13 Patricia Felix: Remember what Rick said about wanting to scare someone and I put
14 two and two together. No. That...it's like I said they...Mike practiced
15 on me. He just, he never said and it never was said her name was
16 never mentioned. Never so I never knew the girls name until the
17 news broadcast. That's when I found out her name. I picked some
18 clothes off the floor and saw they were bloody. Some fell out,
19 something fell out of them and then I saw it was a credit card
20 belonging to Teri Winchell. No, that was in one of my medical
21 books. That I remember. It was in one of my medical books, I never
22 touched it and I took it down to Dennis Sanford.
23 Deputy Chief Ferrari: Okay.
24 Patricia Felix: (Laughing). I remember some of it.
25 Deputy Chief Ferrari: (Unintelligible)...okay.
26 Patricia Felix: Okay and I never picked up any clothes. I saw one of my little boys
27 playing with a hammer on the kitchen floor. No, that...they never
28 played with stuff like that.

1 Deputy Chief Ferrari: Okay, okay but just so we're clear you didn't give this declaration.
2 Patricia Felix: Nope.
3 Deputy Chief Ferrari: Okay, none of this looks familiar to you.
4 Patricia Felix: Nuh uh.
5 Deputy Chief Ferrari: Okay.
6 Patricia Felix: And I don't know who is doing it. See and that's, that's something
7 that's going to have me worried now.
8 Deputy Chief Ferrari: Okay, did anybody make you any...back when the police were
9 investigating did the police coerce you or threaten you in any way to
10 get you to cooperate.
11 Patricia Felix: No, no.
12 Deputy Chief Ferrari: Okay, you felt that you were treated fairly at that time.
13 Patricia Felix: Yes.
14 Deputy Chief Ferrari: Okay, you told the truth at that time.
15 Patricia Felix: Correct.
16 Deputy Chief Ferrari: To the police officers and then also on the witness stand.
17 Patricia Felix: Right.
18 Deputy Chief Ferrari: So you're in your mind right mind would, would you stand by your
19 testimony that you gave back then.
20 Patricia Felix: Yes I would.
21 Deputy Chief Ferrari: Okay now I'm going to ask you some questions okay Patricia and if
22 you don't remember just let, let us know.
23 Patricia Felix: Okay.
24 Deputy Chief Ferrari: Do you remember where you were living at that time.
25 Patricia Felix: On...
26 Deputy Chief Ferrari: Back in 1981.
27 Patricia Felix: On Rite but not the address. It was on Ryde Avenue.
28 Deputy Chief Ferrari: Okay. Do you remember on or about and I'll call it the day of the

1 alleged or that we know now was the homicide, do you remember that
2 day I mean in your mind. If I were to tell you it was January 8, 1981
3 would that sound familiar.
4 Patricia Felix: Not...I couldn't remember the date.
5 Deputy Chief Ferrari: Okay but does that sound like roughly...
6 Patricia Felix: Around that time uh huh.
7 Deputy Chief Ferrari: Around that time okay. That...do you remember that day uh, Rick
8 Ortega coming to the house.
9 Patricia Felix: I think so. I...you know what I can't, I just can't...
10 Deputy Chief Ferrari: Okay
11 Patricia Felix: Visualize that.
12 Deputy Chief Ferrari: Okay, that's fair. Do you remember on or about that date a hammer
13 missing from your house.
14 Patricia Felix: I just...it just...I'm drawing a blank.
15 Deputy Chief Ferrari: Okay.
16 Patricia Felix: I mean you know...
17 Deputy Chief Ferrari: I think rather than go back over your, your statements back then I
18 think we'll just leave it alone in terms of what you said back then was
19 the truth.
20 Patricia Felix: Right.
21 Deputy Chief Ferrari: A lot, a lot...that was twenty-five years ago.
22 Patricia Felix: (Laughing).
23 Deputy Chief Ferrari: It's a, it would be understandable if you forget or you forgot some of
24 those details. Rita do you have any questions of Patricia.
25 Special Agent Sharp: Uh, I can't think of any right now other than you've clarified the
26 declaration so.
27 Patricia Felix: Yeah that just like...
28 Special Agent Sharp: Is there any reason why um...

1 Patricia Felix: Why would somebody do that. That's what I want to know. Why
2 would somebody want to say they're me and say things...

3 Special Agent Sharp: I think Larry has already mentioned or commented is there any reason
4 why you'd want to change your story other than change your story
5 than what you provided in your testimony than in your interview.

6 Patricia Felix: No. I mean it's like they want to...back along. [REDACTED]
7 [REDACTED]

8 Special Agent Sharp: Uh huh.

9 Patricia Felix: There was a [REDACTED]

10 Special Agent Sharp: Uh huh.

11 Patricia Felix: And I was approached by one of Mike's family members to write and
12 say that he wasn't doing drugs because that was going to help him...

13 Special Agent Sharp: Uh huh.

14 Patricia Felix: With lower his sentence or help him get off or something. I cannot
15 sit there and sit and say somebody was doing drugs and I don't know
16 if they were.

17 Deputy Chief Ferrari: Excuse me they asked you to say that he was doing drugs.

18 Patricia Felix: He was doing drugs.

19 Deputy Chief Ferrari: And that was in '89.

20 Patricia Felix: That was back in '89.

21 Deputy Chief Ferrari: Which family member approached you at that time.

22 Patricia Felix: I can't remember [REDACTED] name.

23 Deputy Chief Ferrari: Okay.

24 Patricia Felix: I think it's [REDACTED] first name is [REDACTED] but I don't know [REDACTED] last name.

25 Deputy Chief Ferrari: Okay.

26 Patricia Felix: Or and we were at [REDACTED] at [REDACTED] for [REDACTED]
27 [REDACTED]

28 Deputy Chief Ferrari: Okay.

A

1 Special Agent Sharp: Uh huh.

2 Patricia Felix: You know so I mean that just kind of...I think it's '89, '93 somewhere

3 around there.

4 Deputy Chief Ferrari: What was going, who's birthday was it.

5 Patricia Felix: [REDACTED]

6 [REDACTED]

7 Special Agent Sharp: Okay.

8 Patricia Felix: [REDACTED]

9 Special Agent Sharp: Okay. Let me ask you this have you talked to anyone recently about

10 this case.

11 Patricia Felix: No.

12 Special Agent Sharp: Any family members.

13 Patricia Felix: [REDACTED]

14 Special Agent Sharp: Okay [REDACTED]

15 Patricia Felix: [REDACTED]

16 Special Agent Sharp: [REDACTED]

17 Patricia Felix: [REDACTED]

18 Special Agent Sharp: Uh huh.

19 Patricia Felix: And [REDACTED] and I just kind of like [REDACTED]

20 [REDACTED]

21 Special Agent Sharp: Okay.

22 Patricia Felix: And she just tells me don't worry about it, don't worry about it.

23 Special Agent Sharp: Has anyone approached you recently other than we've asked you

24 about the declaration...

25 Patricia Felix: No.

26 Special Agent Sharp: Aside from that has anyone approached you and talked to you about

27 the case recently.

28 Patricia Felix: No.

1 Deputy Chief Ferrari: Well I think it's..we've covered everything. It's pretty straight
2 forward. I mean...

3 Patricia Felix: Yeah.

4 Deputy Chief Ferrari: You're, you're a very adamant about the fact that you didn't give this
5 declaration that, that you don't agree with the contents of it...

6 Patricia Felix: Uh uh.

7 Deputy Chief Ferrari: That you stand by your testimony given previously under oath and
8 that you also stand by the statements that you gave to the Stockton
9 Police Department.

10 Patricia Felix: Correct.

11 Deputy Chief Ferrari: Okay...

12 Patricia Felix: And...

13 Deputy Chief Ferrari: Excuse me go ahead.

14 Special Agent Sharp: And also that the signature provided on that declaration is not your
15 signature.

16 Patricia Felix: Correct.

17 Deputy Chief Ferrari: Okay.

18 Patricia Felix: Or the initials.

19 Deputy Chief Ferrari: Is there anything else you'd like to add Patricia that we did not cover
20 that you, you would like the record to reflect.

21 Patricia Felix: No.

22 Deputy Chief Ferrari: Okay, now uh, as I stated you're, you're not in trouble okay and just
23 like we approached you and you had the personal choice as to
24 whether or not you wanted to talk to us that choice remains uh, if
25 anybody else were to talk to you and I'm, and I want to understand
26 and I'm saying this on tape that we, myself nor Rita are suggesting to
27 you or instructing you not to talk to anybody else okay.

28 Patricia Felix: Correct.

1 Deputy Chief Ferrari: However, I, I would remind you that you have that option not to talk
2 to them okay just like you had not to talk to us okay. Now you
3 understand that correct.
4 Patricia Felix: Yes.
5 Deputy Chief Ferrari: Okay. Now if we, if we needed to get a hold of you again would be
6 free to contact you Patricia.
7 Patricia Felix: At home. (Laughing).
8 Deputy Chief Ferrari: At home okay and we have that number.
9 Patricia Felix: (Laughing). Don't, don't do that to me again.
10 Deputy Chief Ferrari: Okay, no we would not be uh, be in contacting you at work or
11 anything like that but you have our cards.
12 Patricia Felix: Yes.
13 Deputy Chief Ferrari: Okay and if you need anything okay or if anything come up any kind
14 of witness intimidation or anything like that feel free to contact us day
15 or night.
16 Patricia Felix: Okay.
17 Deputy Chief Ferrari: Unless it's an emergency then you call 911 of course.
18 Patricia Felix: Yeah. (Laughing).
19 Deputy Chief Ferrari: Okay but uh, Rita can you think of anything else.
20 Special Agent Sharp: Same thing I, I, I've provided her that option also.
21 Deputy Chief Ferrari: Okay and, and uh, do you have any, any questions in your mind as to
22 who we are and what our purpose is here. I mean do you...
23 Patricia Felix: No, I kind of know. (Laughing).
24 Deputy Chief Ferrari: Okay, okay well with that we're going to conclude uh, our interview
25 and the time now is roughly 4:55 PM. Thank you Patricia.
26 Patricia Felix: Okay thank you.
27 Special Agent Sharp: Thank you.
28 END OF INTERVIEW

1 TRANSCRIBED BY JONI K. FERRARI

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Patricia King
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